IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF:

JUSTIN M. HEGNEY

Petitioner.

NO. 34085-2-II

STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Has defendant established that Blakely requires reversal of the decline determination where such hearings determine jurisdiction and not guilt or length of sentence?

2. Has defendant shown a constitutional defect in the court's instructions requiring reversal where the instructions include all of the essential elements and requires the jury to determine each codefendant's guilt separately?

3. Has defendant established error requiring reversal of his convictions as an accomplice when there is no distinction between accomplice and principal liability and defendant asks this court to apply conspiracy law?

4. Has defendant shown that evidence used in the decline procedure was improperly considered where Fifth Amendment concerns do not apply to pretrial

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proceedings and where the prior bad acts were considered only for the purpose of whether the case had prosecutorial merit?

5. Has defendant met his burden of establishing that there is newly discovered evidence that (a) could not have been discovered prior to trial, (b) is material, and (c) is not merely cumulative?

6. Has defendant met his burden of establishing that the decline procedure is cruel and unusual punishment under State, Federal, or International law?

7. Is defendant entitled to retroactive application of the 2005 amendment to the mandatory minimum statute where the statute expressly provides otherwise?

8. Is defendant entitled to relitigate the issue of codefendant hearsay where such a determination was made in the direct appeal?

9. May defendant relitigate all of his issues raised in the direct appeal where he has made no showing that such a rehearing is necessary in the interest of justice?

10. Has defendant established that he is denied good time?

B. STATUS OF PETITIONER:

Petitioner, JUSTIN M. HEGNEY, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 01-1-01150-4 for the offense of first degree felony murder. (Appendix A). For the crime the defendant is serving a mandatory minimum sentence of 240 months (20 years). Id.

On March 2, 2001, the State charged Hegney with first degree felony murder, pursuant to RCW 9A.32.030(1)(c), arising from the robbery and beating death of Erik

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Toews. (Appendix B). Hegney was 15 at the time of the offense. Id. Hegney's case was joined for trial with defendant Hill before the Honorable Karen Strombom. RP 3.

On February 12, 2001, Hegney's case came before the Honorable Karen L. Strombom for a declination hearing. Report of Proceeding (RP) of Declination Hearing, at 2. The court declined jurisdiction after a four-day hearing. (Appendix C).

During pre-trial rulings, the court ruled that evidence of a prior assault and robbery near Wright Park's "duck pond" involving Hegney would be admissible against Hegney under ER 404(b). RP 1503. This incident involved two other youths who were also involved in the Toews murder, and it occurred about two months before the murder. RP 2113.

On January 28, 2002, the jury found Hegney and Hill both guilty of first degree felony murder. RP 2634.

Defendant's conviction was affirmed in an unpublished opinion. In that opinion the court considered and rejected arguments that (1) the decline was unwarranted under the Kent factors, (2) the court should have granted a change of venue, (3) the codefendants' trials should have been severed, (4) 404(b) evidence was inadmissible, (5) there was insufficient evidence for conviction, (6) there was error in the accomplice liability instruction, and (7) the prosecutor committed misconduct. (Appendix I).

A mandate was issued on December 17, 2004. (Appendix D).

Defendant files this, his first personal restraint petition.

2. Facts

On August 19, 2000, Terrance Hunt, 19, had a barbecue at this house near 8th and Grant Street in Tacoma. RP 1901, 1907. Charles Neely, 11, was at the barbecue and had

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the stick portion to a croquet mallet with him. RP 1904-05; 2028. Hegney was at the barbecue. RP 1950. Hill and Jermaine Beaver, 15, arrived at Hunt's barbecue sometime late in the evening, after returning from a church camping trip. RP 2226, 2366. Hill and Beaver stayed only for about a minute-and-a-half. RP 2367-68. During this short time period, Neely bragged to Hill that Neely had beat up some guy with a stick. RP 2392. At some point, Hegney left the barbecue to walk a friend home. RP 2255.

While away from the barbecue, Hegney received a phone call from Hunt telling him they were "going out tonight." RP 2255. Hegney later explained to a detective that he knew "going out" meant they were going out to beat someone up. RP 2255. After receiving Hunt's call, Hegney returned to the barbecue, and there was talk at that time among the youths about "going out." RP 2255. Hegney told a detective that Neely was highly excited about the prospect of "going out" and had with him what Hegney believed was an aluminum pole or stick. RP 2256, 2277, 2294. Hegney heard Neely say, "I'm taking this with us." RP 2277.

Hegney and the group left Hunt's house at around 10 p.m. RP 2256. Included with Hegney in this group were: Hunt, Robert (16) and Manuel Hernandez (12), Neely, Jamar Spencer (12), and Kashif Oyeniyi(15). RP 1954-56; 2274. Beaver and Hill had returned to Hill's house to pick up a jacket, and they then met up with the other youths about a block away from Hunt's house. RP 2170, 2367-68; 2423. The group walked for about 3 ½ blocks and then turned onto Division Avenue. RP 1907, 2169.

Michael Franklin lived at the apartment building at North 4th and Division Avenue in Tacoma. RP 1754. That evening, he was loading boxes into his car in front of the apartment building on Division Street. RP 1756. He noticed the group of youths

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coming down Division toward him. RP 1757. The youths came to the front of the building and stopped by the porch. RP 1759. By this point, the group had walked about 9 blocks together in search of a victim. RP 2169. Hunt and Robert Hernandez went into an open door. RP 1759, 1910, 2370, 2424.

Franklin knew they had no reason to enter the building, so he asked if he could help them. RP 1760, 1912. Hunt came out the door and said, "I don't know, can we help him?" RP 1760. Various group members huddled up and talked for a while. RP 1761. During this time, Hunt asked the group if they were going "to get" Franklin. RP 1912.

Franklin felt threatened because of the group members' demeanor, their attitude, and tone of voice. RP 1761. He put his keys in between his fingers and stayed by his car to guard its contents. RP 1761-62. As the group members huddled together, Spencer pointed out to the group that there were too many cars coming on Division, which was a busy street. RP 1913-14. The group did not attack Franklin. RP 1914

Franklin watched as they all walked around the corner of his apartment building and out of Franklin's view. RP 1762-63. When the group members turned this corner, they saw Erik Toews. RP 1914; 2425.

Toews was thirty years old, six-feet tall, and in good health. RP 1626, 1680, 1693. He had just left his residence to visit a nearby friend. RP 1681, 1689. Toews wore cargo pants that had front, side, and back pockets. RP 1681-82. He wore a hooded shirt with flap pocket in front and a tweed hat. RP 1682, 1689. He had with him his house keys, wallet and cigarettes. RP 1687. He also had a $20 bill, some marijuana and a marihuana pipe. RP 1959, 2232, 2386.

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Hill told Spencer to ask Toews for a cigarette, which Spencer did. RP 1920-21. Toews gave Spencer a cigarette. RP 2382. While Toews was distracted, Hunt came up from behind Toews and punched Toews in the head, knocking him to the ground. RP 2372, 2393. Various group members, who had also been behind Toews, then ran up and started kicking and stomping on Toews. RP 2372, 2393. Hunt, Spencer, the Hernandez brothers, and Neely were kicking Toews. RP 2428.

Hegney later told a detective that when Toews went down, he also ran up and kicked Toews. RP 2279. Hegney stated that while he was kicking Toews, he saw that Toews's pockets were "being gone through." RP 2279. Hegney said he saw Neely hitting Toews in the head with the pole. RP 2279. Hegney stated he saw Robert Hernandez on top of Toews, punching him in the head in an attempt to keep Toews from getting up. RP 2260.

Hill later told a detective that he saw Robert Hernandez hit Toews, and saw Hunt "stomping the guy in the face." RP 2222. Hill said he saw Neely strike Toews with the stick. RP 2224, 2229. Hill stated, "While everybody was hitting him, I just took the weed out of his pocket." RP 2232.

This assault occurred behind Franklin's building. RP 2195. Toews never tried to fight back. RP 2404. At some point, Toews was able to get up, but he was only able to run across the street, less than 100 feet, before Hunt hit Toews to knock him unconscious. RP 1925, 2198-99, 2429.

Hunt started to do "knee drops" while Robert Hernandez was kicking Toews. RP 2430. At this time, Oyeniyi helped Robert Hernandez roll over Toews's body, and Hernandez then went through Toews's back pockets and pulled out a marihuana pipe.

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RP 2436-37. Spencer stole $20 from Toews's pocket. RP 1959. Toews's keys, wallet, cigarettes, and hat were also stolen and never recovered. RP 1693.

A man who lived in a second floor apartment behind Franklin's apartment building was in his living room that night. RP 1791. He heard noises, and as the noises grew louder, and he could distinguish "quite a few" different voices. RP 1791-92. After two to three minutes, the voices got so loud he went to his window to look. RP 1792, 1808. He saw what he described as six or more youths down below in the street standing in a tight circle. RP 1792, 1793, 1806. He looked at the youths for about a minute. RP 1794. During this time span, he did not see anyone leave the group, walk, or run away. RP 1794. He noticed both Caucasian and African-American youths in the group. RP 1797. He would later describe the group of youths as a "mixed crowd." RP 1797.

During the assault, Terrance Hunt looked up and saw the man in the window. RP 1793, 1925. The man could hear Hunt exclaim to the others, "Somebody is looking out the window!" RP 1793, 1925. The youths all looked up at the man, and they all ran. RP 1793-95; 1926; 2437. Hegney later stated to the police that he also ran when the group realized it was being watched. RP 2262.

Beaver's testimony confirmed that everybody ran at the same time, including Hegney and Hill. RP 2385-86; 2395. Once the youths scattered, the man in the window could see that the youths had been standing around Toews, who was lying motionless on the ground. RP 1794, 1808.

Hegney and Hunt became separated, and Hegney made two calls to Hunt's cell phone. RP 2263. The first call occurred at 10:28 p.m., and the other occurred at 10:29 p.m. RP 2173. Two or three minutes after the youths fled, the man dialed 911. RP

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1789. He made this call at 10:30 p.m. RP 1785, 1788. The police and an ambulance arrived within five minutes of this call. RP 1797. The man never saw any of the youths return to the scene once they had scattered. RP 1797.

Michael Franklin was still in front of his apartment building, and he saw the youths running away from behind both ends of his apartment building. RP 1762. He saw them run about five minutes after he had last seen the group disappear behind the corner. RP 1762. He also called 911. RP 1765.

When the ambulance arrived, Toews was unconscious. RP 1826. He had a great deal of swelling around the eyes, neck and face. RP 1826. He had a large amount of blood around his mouth and nose. RP 1826. His breathing was inadequate, and he had fluid or blood in his lungs. RP 1828, 1832.

Meanwhile, after the assault and robbery of Toews, various group members met up in an alley and showed each other what they had stolen from Toews. RP 2386, 2394. Robert Hernandez showed Beaver the marihuana pipe he had stolen. RP 2386. Hill later showed Beaver the marijuana Hill had stolen. RP 2387. Hegney, along with other group members, returned to Hunt's house. RP 2281. Hegney later explained to a detective that while at Hunt's, Hegney and Robert Hernandez smoked Toews's marijuana with the pipe that had also been stolen. RP 2263, 2291.

Toews never regained consciousness, and he died five days later. RP 1693. Dr. Howard, the Chief Medical Examiner, performed an autopsy on Toews's body. RP 1616. The body, from head to toe, showed evidence of edema or swelling. RP 1650. Toews's face had signs of injury on his cheek, lower lip, chin, and eyes. RP 1631. His left front

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tooth was missing. RP 1635. He had multiple sites of blunt impact injury to the left arm, right arm, back, and leg. RP 1636-42.

Toews had hemorrhaging in the muscle and soft tissue near his right and left temple. RP 1645-46; 1647. His head injury alone was severe enough to cause death. RP 1654. However, Toews's non-head related injuries also contributed to his death. RP 1656. Dr Howard testified at trial that: "[Toews] died as a result of the accumulation of all of the injuries and the body's response to that injury. Each blow is an additional contribution toward his death." RP 1659.

Toews's death was reported the following day in the newspaper, and various group members met in Hegney's garage upon learning of the death. RP 1931, 2264-65; 2293. Present were Hunt, Hegney, Spencer, Robert, and Manuel Hernandez, and a friend of Hegney's named Jonathan Owens. RP 1932-33. The group remained together for an hour or two. RP 2063. Spencer had brought a newspaper. RP 2063. Hegney later told a detective that the group talked about being in trouble and created alibis if the police contacted them. RP 2265. Hunt even wrote down alibis on a piece of paper. RP 1966.

On August 28, 2000, the police arrested Hegney and Hill at separate locations and advised both of their rights. RP 1873-74; 2210-11. As noted above, both made statements to the police.

Duck Pond Incident.

In June or early-July of 2000, Hegney was at Wright's Park near the duck pond with Hunt, Robert Hernandez, and a youth named Perry Dunham. RP 2113, 2183. An unknown man asked Hegney for a light, and Hegney let the man use his lighter. RP 2183. Hunt looked at Hegney, and Hegney shook his head slightly and made a cutting

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motion across his throat. RP 2183. Hegney believed that Hunt was going to hit the man. Hunt asked Hegney why he had done that. RP 2184. Hegney said that the man still had the cigarette lighter. RP 2184. According to Hegney's statement to the police, after he got his lighter back, Hunt said, "Slug bug," and punched the man knocking him down. RP 2184. Hegney said Dunham punched the man in the face, and Robert Hernandez kicked him in the groin. RP 2184. Hegney admitted that he also kicked the man in the man's side. RP 2184.

Hegney stated they started to leave, but Robert Hernandez hung back from the rest, went through the man's backpack and found some condoms inside. RP 2184. Hernandez told the others about the condoms. RP 2185-86. Hunt went back and got ten condoms from the man's backpack, and he left the backpack on the ground when they left. RP 2185, 2205. Hegney was aware that this property was stolen from the victim. RP 2205.

C. GENERAL PERSONAL RESTRAINT PETITION LAW.

Personal restraint procedure has its origins in the State's habeas corpus remedy, guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. In re Hagler, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. These are

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significant costs, and they require that collateral relief be limited in state as well as federal courts. Hagler, Id.

In this collateral action, the petitioner has the duty of showing constitutional error and that such error was actually prejudicial. The rule that constitutional errors must be shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions. In re Mercer, 108 Wn.2d 714, 718-21, 741 P.2d 559 (1987); Hagler, 97 Wn.2d at 825. The petition must include a statement of the facts upon which the claim of unlawful restraint is based and the evidence available to support the factual allegations. RAP 16.7(a)(2); Petition of Williams, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). If the petitioner fails to provide sufficient evidence to support his challenge, the petition must be dismissed. Williams at 364. Affidavits, transcripts, and clerk's papers are readily available forms of evidence which a petitioner may employ to support his claims. Id. at 364-365. Mere assertions are insufficient in a collateral action to demonstrate actual prejudice. Inferences, if any, must be drawn in favor of the validity of the judgment and sentence and not against it. In re Hagler, 97 Wn.2d at 825-26. To obtain collateral relief from an alleged nonconstitutional error, a petitioner must show "a fundamental defect which inherently results in a complete miscarriage of justice." In re Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher standard than the constitutional standard of actual prejudice. Id. at 810.

Because of the costs and risks involved, there is a time limit in which to file a collateral attack. The statute that sets out the time limit provides:

> No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after

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> the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
>
> RCW 10.73.090(1). In addition to the exceptions listed within that statute, there are other specific exceptions to the one-year time limit for collateral attack. However, the time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on:
>
> (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100.

D. LAW AND ARGUMENT.

1. BLAKELY DOES NOT REQUIRE REVERSAL OF THE COURT'S DECLINE DETERMINATION BECAUSE SUCH A FINDING IS JURISDICTIONAL IN NATURE AND HAS NOTHING TO DO WITH THE LENGTH OF SENTENCE IMPOSED.

a. Blakely does not apply to decline hearings.

In Apprendi v. New Jersey, (Blakely's predecessor case) the United States Supreme Court held that with the exception of a defendant's prior convictions any disputed fact that increased the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In Blakely, the Supreme clarified its ruling that the "statutory maximum" is the maximum term of imprisonment that a judge

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may lawfully impose "*solely on the basis of the facts reflected in a jury verdict or admitted by defendant.*" 542 U.S. 296, 124 S. Ct. 2531, 2537-38, 159 L.Ed.2d 403 (2004).

At issue in the present case is whether a jury determination is required for declining jurisdiction under RCW 13.40.110(2).[1] A declination determination is strictly a judicial/jurisdictional issue that does nothing to raise the penalty of the case; instead it changes only the forum of the case. "Unlike a determination of delinquency or guilt, a determination of whether to decline jurisdiction *does not directly result in confinement or other punishment*, and a decline hearing is not, therefore, an adversary proceeding." State v. M.A., 106 Wn. App. 493, 503, 23 P.3d 508 (2001)(*citing* In re Harbert, 85 Wn.2d 719, 725, 538 P.2d 1212 (1975)), *emphasis added.*

This argument was already rejected in State v. H.O., and this analysis still stands post-Blakely. 119 Wn. App. 549, 81 P.3d 883 (2003). In H.O. the court refused to apply the Apprendi rule to juvenile declination hearings. The court reasoned that what was at stake in the proceedings (jurisdiction) did not involve a determination of guilt or length of sentence. 119 Wn. App. at 554. The court noted that prior to *Apprendi,* Washington had rejected a claim that the standard of proof for a decline hearing should be "preponderance of the evidence." H.O., 119 Wn. App. at 553 (*citing*, State v. Jacobson, 33 Wn. App. 529, 531, 656 P.2d 1103 (1982)), review denied, 99 Wn.2d 1010 (1983). In

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[1] RCW 13.40.110(2) provides:

(2) the court after a decline hearing may order the case transferred for adult criminal prosecution upon a finding that the declination would be in the best interest of the juvenile or the public. The court shall consider the relevant reports, facts, opinion, and arguments presented by parties and their counsel.

Prior to transferring jurisdiction a court must also consider the eight Kent factors. H.O., 119 Wn.App. at 553 (citing Kent v. United States).

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rejecting a standard higher than preponderance the Jacobson court reasoned that the proceedings determined, "not ultimate guilt or innocence, but the forum in which guilt or innocence was to be found." H.O. at 553. The H.O. court agreed with this analysis and concluded that where a hearing is "designed to determine whether the case should be heard in juvenile or adult court" a preponderance standard is sufficient evidence for a judge to make such a discretionary determination. Id. At 554-555.

To date only one court has considered whether Blakely requires reconsideration of declination hearings under Apprendi, and the court's well-reasoned conclusion was that no reconsideration is warranted. See, State v. Kalmakoff, 122 P.3d 224 (2005). The Alaskan court noted that the great weight of authority, albeit pre-Blakely, called for the conclusion that juvenile waiver proceedings are not subject to Blakely and Apprendi.[2]

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[2] In reaching its determination the court canvassed other jurisdictions and found that with the exception of Massachusetts, all other decisions conclude that *Apprendi* does not apply to juvenile waiver proceedings. 122 P.3d at 227, at f.n. 29 citing *United States v. Juvenile*, 228 F.3d 987, 990 (9th Cir. 2000) (rejecting the claim that juvenile transfer increases punishment and holding that it "merely establishes a basis for district court jurisdiction."); *United States v. Miguel*, 338 F.3d 995, 1004 (9th Cir. 2003) ("by its own terms Apprendi does not apply to [juvenile transfer proceedings] ... [because] the transfer proceedings establish[] [only that] the district court [has] jurisdiction over the defendant."); *United States v. Phillip A.B.L.*, 100 Fed. App. 687, 689 (9th Cir. 2004) (same); *State v. Rodriguez*, 205 Ariz. 392, 71 P.3d 919, 927-28 (Ariz. App. 2003) (holding that a juvenile transfer statute "is not a sentence enhancement scheme and, therefore, does not implicate Apprendi... [because it] does not subject [a] juvenile to enhanced punishment; it subjects the juvenile to the adult criminal justice system."); *People v. Beltran*, 327 Ill. App. 3d 685, 765 N.E.2d 1071, 1076, 262 Ill. Dec. 463 (Ill. App. 2002) (Apprendi does not apply because such hearings are "dispositional, not adjudicatory."); *In re Matthew M.*, 335 Ill. App. 3d 276, 780 N.E.2d 723, 733-34, 269 Ill. Dec. 251 (Ill. App. 2002) (same); *People v. Perea*, 347 Ill. App. 3d 26, 807 N.E.2d 26, 41-42, 282 Ill. Dec. 730 (Ill. App. 2004) (same); *State v. Jones*, 273 Kan. 756, 47 P.3d 783, 797-98 (Kan. 2002).(Apprendi does not apply to juvenile waiver hearings because they only determine "which system will be appropriate for a juvenile offender."), *cert. denied*, 537 U.S. 980, 123 S. Ct. 444, 154 L. Ed. 2d 341 (2002); *State v. Williams*, 277 Kan. 338, 85 P.3d 697, 707 (Kan. 2004) (same); *State v. Mays*, 277 Kan. 359, 85 P.3d 1208, 1216 (Kan. 2004) (same); *State v. Hartpence*, 30 Kan. App. 2d 486, 42 P.3d 1197, 1205 (Kan. App. 2002) (same); *Caldwell v. Commonwealth*, 133 S.W.3d 445, 452-53 (Ky. 2004) (in analyzing its own automatic transfer statute the court held that "Apprendi does not apply to juvenile proceedings."); *State v. Gonzales*, 2001 NMCA 25, 130 N.M. 341, 24 P.3d 776, 783-85 (N.M. App. 2001) (holding that Apprendi does not apply to its own automatic transfer statute);

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Also of particular noteworthiness is the Ninth Circuit's rejection of this argument in United State v. Juvenile, supra, and the United States Supreme Court's denial of certiorari in a Kansas case that had rejected an Apprendi claim in this context in State v. Jones, 273 Kan. 756, 47 P.3d 783, 797-98 (2002), *United States Writ of Cert. Denied at*, Jones v. Kansas, 537 U.S. 980, 123 S. Ct. 444, 154 L. Ed. 2d 341, 2002 U.S. LEXIS 7901, 71 U.S.L.W. 3282 (2002).

The State asks this court to follow H.O. and Kalmakoff and conclude that the same reasoning in H.O. stands post-Blakely because declination involves jurisdiction and not a determination of guilt or length of sentence.

b. There is no denial of equal protection.

Juveniles are neither a suspect class nor a semi-suspect class. State v. Schaaf, 109 Wn.2d 1, 19, 743 P.2d 240 (1987). Thus, the rational relationship test applies here. See State v. Shawn P., 122 Wn.2d 553, 561, 859 P.2d 1220 (1993) (holding the mandatory revocation of driving privileges, which applies only to minor teenagers who are determined to have violated the minor possessing/consuming alcohol law, does not violate equal protection): "The rational relationship test is the most relaxed and tolerant form of judicial scrutiny under the equal protection clause. Under this test, the legislative classification will be upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives." Id. at 561.

"Equal protection requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." Simmons, 152 Wn.2d at 458. But this does not guarantee criminal defendants complete equality. Id. It instead guarantees that the law will be applied equally to persons "similarly situated." State v. Rushing, 77

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Wn. App. 356, 359, 890 P.2d 1077 (1995). The challenger must then show that he is "similarly situated" with other persons who have received different treatment. Rushing, 77 Wn. App. at 359. "Similarly situated" means "near identical participation in the same set of criminal circumstances." Rushing, 77 Wn. App. at 359-60. The definition of the class of persons effectively dictates whether the constitutional right to equal protection has been violated.

Defendant attempts to define two classes of persons: "Here the classification involves 15 year old children charged with First Degree Murder. Some of these children remain in the juvenile system for rehabilitation, and can be held beyond the standard range, until their 21st birthdays but only though the use of the reasonable doubt standard. Other children, like Mr. Hegney, are bound over to the punitive adult system, where they face life in an adult prison, with a mandatory minimum sentence of 20 years, but only with a standard of proof of preponderance of the evidence." (PRP at 29-30). This argument again blurs jurisdictional decisions with sentencing decisions. Defendant is not similarly situated to other juvenile defendants because a court has already made a determination under the Kent factors that he should be treated as an adult. Defendant is also not sentenced to 20 years in prison until a jury determines beyond a reasonable doubt that he is guilty of the offense.

Even assuming there are two separate classes of persons, (e.g. those juveniles who remain in the juvenile system and those who are declined under the Kent factors) there is a rational relation to this distinction. The Kent factors provide the rational basis. It is rational to treat juvenile defendants differently if the court considers the eight factors and determines that trial as an adult is warranted. (See State's Response to PRP at page

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28 for list of Kent factors). Allowing more severe punishment for certain offenders, including juvenile offenders, is relevant to a legitimate state objective. See, In re Boot, 130 Wn.2d 553, 925 P.2d 964 (1996) (rejecting an equal protection argument for juveniles automatically declined under RCW 13.04.030(1)(e)(iv)).

2. THE INSTRUCTIONS TO THE JURY AND THE "TO CONVICT" INSTRUCTIONS REQUIRED THE JURY TO CONSIDER EACH DEFENDANT'S GUILT SEPARATELY AND THERE WAS NO INSTRUCTIONAL ERROR.

a. Invited Error.

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. State v. Rahier, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing State v. Jackson, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. State v. Harris, 62 Wn.2d 858, 385 P.2d 18 (1963). A challenge to a jury instruction may not be raised for the first time on appeal unless the instructional error is of constitutional magnitude. State v. Dent, 123 Wn.2d 467, 478, 869 P.2d 392 (1994).

In the instant case defendant failed to object to the court's instruction to the jury. Defense counsel Fricke's own affidavit opines that this was a court generated instruction and that he did not object. (Defendant's Ex. 22, Certification of Wayne Fricke at 2). Because the defendant's argument does not allege that the instructional error involved a

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missing element, this court must follow Dent and defendant is precluded from raising this instructional error.

b. The court's instructions were an accurate statement of the law.

An appellate court reviews alleged instructional errors under a de novo standard of review. State v. Benn, 120 Wn.2d 631, 654-55, 845 P.2d 289, cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331, (1993).

"The rule is well established that instructions must be read together and viewed as a whole." State v. Teal, 117 Wn. App. 831, 838, 73 P.3d 402 (2003). Jury instructions must clearly set forth the elements of the crime charge. State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996); Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). A "to convict" instruction must contain all of the essential elements; the jury should not be required to search the other instructions to see if another element should be added to those listed. State v. Oster, 147 Wn.2d 141, 147, 52 P.3d 26 (2002); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). A "to convict" instruction which purports to be a complete statement of the law and yet omits an element creates a constitutional error requiring reversal. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

Here, when read as a whole, the jury was properly instructed that each defendant's guilt is determined *separately* and *unanimously*. Instruction three laid out for the jury that each defendant's guilt was to be considered separately:

> A separate crime is charged against one or more of the defendant in each count. The charges have been joined for trial. You must decide the case of each defendant or each crime charged against that defendant separately.

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> Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

(Appendix F – Inst. 3).[3]

The "to convict" also required the jury to convict each defendant separately:

> To convict either the defendant JUSTIN HEGNEY or the defendant JESSE HILL of the crime of Murder in the First Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt;
>
> (1) That on or about the 19th day of August, 2000, ERIK TOEWS suffered injuries that resulted in his death on or about the 25th day of August, 2000;
> (2) That the defendant or an accomplice was committing or attempting to commit the crime of Robbery in the First Degree;
> (3) That the defendant or an accomplice caused the death of ERIK TOEWS in the course of or in the furtherance of such crime or in immediate flight from such crime.

Separate verdict forms were returned on each defendant. (Appendix G & H).

Defendant now comes before this court and asks for a strained, illogical, and inconsistent reading of the above jury instructions. First, he asks the court to ignore the rule of law that instructions are to be read as a whole, and ignore court's instruction number 3, which in this case requires the jury to consider the guilt of each defendant separately. Second, the defendant asks this court to find that the court's instructions allowed the jury to convict defendant Hegney based on "the defendant" Hill's actions alone, or vice versa.

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[3] The jury was also provided with limiting instructions which cautioned them not to use certain 404(b) evidence regarding Justin Hegney against defendant Jesse Hill and vice versa. (Appendix F - Inst. 32, 33).

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A similar argument was rejected in State v. Teague, 117 Wn.App. 831, 73 P.2d 402 , rev'd on other grounds, 152 Wn.2d 333, 96 P.3d 974 (2004). In Teague the defendant complained that the "to convict" instruction was flawed because it failed to include accomplice liability language. In rejecting this argument the court looked to the fact that (1) all of the essential elements of the charge were included in the "to convict" instruction (and that accomplice liability is not one of them), (2) that the instructions as a whole defined accomplice liability, and (3) that the instructions allowed the parties to argue their theory of the case. 117 Wn. App. at 838-842.

Similarly in the case at bar all of the essential elements were contained in the "to convict" instruction. The jury was required to consider each defendant's guilt separately. (Appendix F - Inst. 3). Closing argument was consistent with this. The State was very careful to point out the separate consideration of each defendant's guilt:

> . . .Yes, the state has prove beyond a reasonable doubt that both, and, again, the instructions are going to tell you treat them individually, but for purposes of this argument, both Justin Hegney and Jesse Hill, you are guilty of murder in the first degree as charged . . .

(RP 2556).

In rebuttal the state further emphasized the separate culpability of Hegney and Hill. RP 2617-18.

The law and argument in this case made clear to the jury that their duty was to conduct a separate determination of guilt with respect to each defendant. The court's instructions contained all of the essential elements and allowed each party to argue their theory of the case. Trial counsel obviously had no difficulty with the way the instructions read. It is only at this stage that the defendant asks for a different reading of the instruction. His argument is not that the instruction is constitutionally flawed, but

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that he would have preferred different wording. Personal restraint petitions are not an opportunity to rewrite instructions, closing arguments, or recross witnesses. Such decisions are properly left to trial counsel. As the Ninth Circuit aptly stated, "[t]here are many ways to be effective, and we must resile from present counsel's attempt to lure us into the hindsight miasma that the Supreme Court has told us to avoid." Smith v. Stewart, 140 F.3d 1263, 1273 (9th Cir. 1998).

c. Counsel was not ineffective.

Trial counsel's failure to object to an erroneous jury instruction may demonstrate ineffective assistance of counsel if the defendant can show that the erroneous instruction actually prejudiced him or her. State v. Wilson, 117 Wn. App. 1, 17, 75 P.3d 573, review denied, 150 Wn.2d 1016, 79 P.3d 447 (2003).

As argued *supra* the instruction was an accurate statement of the law and thus defense counsel was not ineffective for failing to except to these instructions. (See Also, Harmless Error Argument *infra* for whether the instruction actually prejudiced defendant).

d. Defendant fails to establish prejudice.

Even assuming there was any instructional error, defendant has failed to meet his burden of showing actual prejudice. The evidence of guilt was overwhelming in this case.

A person commits first degree felony murder if the person commits or attempts to commit the crime of robbery in the first degree, and "in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the

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death of a person other than one of the participants." RCW 9A.32.030(1)(c). Under this statute, a homicide is committed during the perpetration of the predicate felony if the death is within the "res gestae" of that crime. State v. Leech, 114 Wn.2d 700, 706, 790 P.2d 160 (1990). A murder is within the "res gestae" of the felony "if there was a close proximity in terms of time and distance between the felony and the homicide." Leech, 114 Wn.2d at 706.

The predicate felony in this case is robbery. A defendant commits robbery when the person takes property from the person of another against the person's will by the use or threatened use of immediate force. RCW 9A.56.190. Such force must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking. RCW 9A.56.190. A person commits robbery in the first degree if: (1) the person or an accomplice is armed with a deadly weapon during the commission of the robbery; or (2) the person or an accomplice inflicts bodily injury during the robbery. RCW 9A.56.200(1).

Hegney participated not as a principal, but as an accomplice to the crime of robbery. For purposes of the felony murder rule, a person is a "participant" in the underlying crime if he is involved as either a principal or an accomplice. State v. Toomey, 38 Wn. App. 831, 840, 690 P.2d 1175 (1984), cert. denied, 471 U.S. 1067 (1985).

A person is an accomplice to a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she:

> (i) solicits, commands, encourages, or requests such other person to commit it; or
> (ii) aids or agrees to aid such other person in planning or committing it. . . .

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RCW 9A.08.020(3). In this case, the evidence is sufficient to show that Hegney knowingly aided others in the robbery by participating in the ongoing assault that incapacitated Toews. Hegney saw Toews being asked for a cigarette. RP 2258. He saw Hunt then punch Toews in the head, forcing Toews to the ground. RP 2258. After Toews fell, Hegney participated in the assault by kicking Toews while he was down. RP 2279. Hegney told the detective," Everybody including myself ran up and started kicking him." RP 2279. Hegney also saw Hernandez on top of Toews, punching Toews in the head to keep Toews from getting up. RP 2260. Those assaulting Toews assisted those who robbed him by keeping Toews incapacitated. Hegney knowingly assisted the others in robbing Toews when he kicked Toews while knowing Toews's pockets were "being gone through." RP 2279.

Hegney's participation in the earlier incident at Wright's Park's duck pond is also evidence that Hegney knowingly aided the others in committing the robbery when he assaulted Toews. In the Wright's Park incident, which occurred about 1 ½ to 2 months prior to the murder, Hegney participated in assaulting the victim with Hunt and Robert Hernandez. RP 2184. Hernandez then went through the victim's backpack to see if there was anything to steal. RP 2185-86. Hunt then stole the man's condoms. RP 2205. Hegney was aware that this property was stolen from the victim. RP 2205. This prior incident indicates that Hegney had knowledge that going through the victim's property, or attempting to rob, was a part of the group's activity in finding a victim.

Finally, the robbery was within the "res gestae" of the murder because there was a close proximity in terms of time and distance between the felony and the murder as required under Leech. In terms of the time factor, the record indicates that the entire

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incident with Toews lasted no more than five minutes. RP 1762. During this time period, Toews was kicked and punched multiple times throughout his body. The medical examiner testified that "Toews died as a result of the accumulation of all of the injuries and the body's response to that injury. Each blow is an additional contribution toward his death." RP 1659.

In terms of the distance factor, the entire incident occurred behind Franklin's apartment building, and Toews was able to run no more than 100 feet before being knocked down the second time. RP 2198-99. The robbery was ongoing at both locations. While Hill may have robbed Toews when Toews first fell to the ground, Spencer and Robert Hernandez robbed Toews after he had been knocked unconscious. RP 1959, 2436-37. The evidence is sufficient to show that the robbery occurred in close proximity in terms of time and distance with the murder. The robbery was within the res gestae of the murder. The evidence is sufficient to support the defendants' convictions.

The felony murder statute does not set forth a requisite mental element for the murder itself; instead, the state of mind required for the murder is the same as that which is required to prove the predicate felony. State v. Dennison, 115 Wn.2d 609, 615, 801 P.2d 193 (1990). Thus, if a death occurs in the attempt, commission of, or immediate flight from commission of the predicate felony, it is unnecessary to prove that the killer or another participant acted with malice, design, or premeditation. Dennison, 115 Wn.2d at 615. Also, where the murder is committed accidentally in the course of committing the predicate felony, the participants in the felony are still liable for the homicide. See e.g. Leech, 114 Wn.2d 700. The court should reject the defendant's arguments that the State had to prove they "knew" an especially brutal and vicious beating would occur.

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Because the evidence of guilt is overwhelming, defendant cannot meet his burden of establishing prejudice.

3. THE DEFENDANT WAS NOT CONVICTED OF A CONSPIRACY OFFENSE AND THERE IS NO REQUIREMENT TO NAME ACCOMPLICE OR PRINCIPALS IN THE CHARGING DOCUMENT.

An accused has a constitutional right to be informed of the nature of the charges against him or her. Washington courts have held that this right is not violated when a defendant is found guilty as an accomplice even though the information did not expressly charge aiding or abetting or refer to other persons. See, e.g., State v. Carothers, 84 Wn.2d 256, 260, 525 P.2d 731 (1974), overruled on other grounds (a defendant may be found guilty as an accomplice even though he was not expressly accused of aiding and abetting and even though he was the only person charged), State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984); State v. Frazier, 76 Wn.2d 373, 375-77, 456 P.2d 352 (1969); State v. Thompson, 60 Wn. App. 662, 666, 806 P.2d 1251 (1991).

The defendant attempts to argue under co-conspirator law that he was entitled to have all accomplices charged and named in the instructions. See, PRP at 21 (citing State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986). This law has never been extended to accomplice liability jurisprudence. Instead, courts have concluded that defendant's may be convicted without the naming of other accomplices involved. Carothers, supra at 260. There is no merit to defendant's argument that he was convicted of an "uncharged crime."

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4. THE DECLINE PROCEDURE WAS NOT MARRED BY THE USE OF INADMISSIBLE EVIDENCE.

Defendant complains that the court considered evidence that was inadmissible at trial during the declination hearing. First he alleges that the trial court improperly considered defendant's "uncooperativeness" with the police on August 23, 2000, where that contact was later ruled to be inadmissible because of Fifth Amendment violations. RP 2/12/01, 96-97, (Defendant's Ex. 8 -FOF/COL). Second defendant alleges that the court considered prior bad act evidence that was later ruled unproven. RP 1491-95, 1508, 1/2/01. Neither argument has any merit.

At the outset, this court should note that defendant claims these alleged errors violate his right to procedural and substantive due process. (See PRP at 28). Defendant makes this argument without any citation to authority or legal argument. This court should reject such an unsupported argument: "[n]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." In re Rozier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986).

Statements obtained in violation of Miranda or RCW 13.40.140(8) *are admissible* at preadjudication hearings such as a decline hearing. State v. Linares, 75 Wn. App. 404, 880 P.2d 550 (1994); State v. Ramer, 151 Wn.2d 106, 110, n. 1, 86 P.3d 132 (2004); In re Harbert, 85 Wn.2d 719, 725, 538 P.2d 1212 (1975). Thus defendant's argument that the court impermissibly considered evidence taken in violation of Miranda is without merit. There is also no reference to this in the courts findings of fact and conclusions of law. (Appendix E).

As to the prior bad act evidence, defendant overstates the use of these matters in the declination process. In FOF IV the court stated that it considered evidence "that the

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Respondent knew the group was out to beat someone up, and that the Respondent had participated in prior assaultive incidents in which items had been taken from the assault victim," when looking at whether the complaint has "prosecutive merit." Ultimately, the "duck pond" incident was admitted at trial and did, as the court concluded, add to the prosecutive merit of the case.

In sum, the defendant has failed to establish any constitutional violation and has even failed to make a showing as to how these were considered in the declination process.

5. THERE IS NO NEWLY DISCOVERED EVIDENCE IN THIS CASE THAT REQUIRES RELITIGATION OF THE DECLINE DETERMINATION.

A petitioner may make a newly discovered evidence claim in a personal restraint petition if the proposed evidence "in the interest of justice requires" vacation of the conviction or sentence. In re Lord, 123 Wn.2d 296, 319, 868 P.2d 835 (1994); RAP 16.4(c)(3). This is the same standard that applies to motion for a new trial. Id. Under that test, the defendant bears the burden of showing that the evidence:

> (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.

Lord, 123 Wn.2d at 320 (quoting, State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981)).

The examination of the newly discovered evidence in this case turns on whether it would likely change the result of the decline outcome. A case filed in juvenile court

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may be transferred for adult criminal prosecution upon a finding that the declination of juvenile court jurisdiction would be in the best interest of the juvenile or the public. RCW 13.40.110(2). In making this determination, the juvenile court is to consider the eight Kent factors.[4] All eight of these factors need not be proven; their purpose is to focus and guide the juvenile court's discretion. Toomey, 38 Wn. App. at 833-34. The juvenile court's decision to decline jurisdiction is discretionary and will be reversed only if the court has abused its discretion. State v. Stevenson, 55 Wn. App. 725, 735, 780 P.2d 873 (1989).

Defendant asserts via affidavit from family members, a neuropsychological report, and a DSHS record that new information regarding his family life and upbringing may change the result of the decline hearing. The defendant fails to articulate how this (1) information could not have been discovered before trial through the exercise of due diligence, (2) how the the information is material, (3) and how it is not merely cumulative.

---

[4] The Kent factors are: (1) the seriousness of the alleged offense and whether the protection of the community requires declination; (2) whether the offense was committed in an aggressive, violent, premeditated or willful manner; (3) whether the offense was against persons or only property; (4) the prosecutive merit of the complaint; (5) the desirability of trial and disposition of the entire case in one court, where the defendant's alleged accomplices are adults; (6) the sophistication and maturity of the juvenile; (7) the juvenile's criminal history; and (8) the prospects of adequate protection of the public and rehabilitation of the juvenile through services available in the juvenile system. State v. Holland, 98 Wn.2d 507, 515, 656 P.2d 1056(1983)(citing Kent v. United States, 383 U.S. 541, 566-67, 16 L.Ed.2d 84 , 86 S.Ct. 1045 (1966)).

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a. There was no *Brady* violation where the material was not in possession of the prosecution.

Defendant argues there was a Brady violation in the context of the DSHS records because the State withheld these. This is an untrue statement. The material was not in the possession or control of the State, but instead the probation department. (Defendant's Ex. 22, Certification of Wayne Fricke at 2).

A defendant's constitutional due process right to disclosure relates only to evidence which is favorable to the defendant and material to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194 , 10 L. Ed. 2d 215 (1963); see also State v. Mak, 105 Wn.2d 692, 704, 718 P.2d 407 (1986). This duty is limited to material and information within the knowledge, possession, or control of members of the prosecuting attorney's staff. CrR 4.7(a)(4).

Here, the DSHS records at issue were in the possession of the probation department, thus there was no requirement for disclosure from the prosecutor's office. Nor were the records material to the guilt or punishment of defendant, instead the defense argues they relate only to declination. See, State v. M.A., 106 Wn. App. at 503 (a decline hearing is not a hearing to determine guilt or innocence or determine punishment).

b. The information could have been discovered with the exercise of due diligence.

Defendant incorrectly casts the DSHS records as "newly discovered evidence." According to probation officer Ms. Varela, she turned these documents over to defense

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counsel by March 2, 2001, the date of the entry of findings of fact and conclusions of law. (Appendix E & K). The defendant had an opportunity prior to formal findings being entered, or prior to his filing of a motion for reconsideration, to present the court with this new material. (Defendant's Ex 5, FOF/COL, Defendant's Ex. 3, Motion to Reconsider). Had counsel exercised diligence to inquire of the whereabout of the files or request a continuance then the matter would have come to light at the appropriate time.

As to witness interviews and neuropsychological reports, the defense also could have obtained these prior to the declination hearing. In fact, sister Kristi Hegney was contacted by defense in preparation for the declination hearing. RP 504-05.

c. This information will not change the result of the trial nor is it material.

Although defense counsel purports in his affidavit that the decision to forgo use of the DSHS records was not a tactical one, the content of the records speaks otherwise. (Defendant's Ex. 22, Certification of Wayne Fricke at 2). Of the material the defendant alleges is new and helpful to his case, most if not all is cumulative and therefore not material or likely to change the result of the hearing. (See Argument Infra at 31). Rather than changing the outcome, some of the information only reinforces the court's determination. For example, the file reveals that defendant was accused of having forced anal sex with a classmate and was "out of control" at home. This information would have be relevant for the Kent factor regarding prior criminal activity and thus supported declination.

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Nor is this "new" information material to the outcome. No where in the Kent factors does it call for a consideration of family background or prior abuse of the defendant. And yet the defendant complains to this court that an isolated report of his mother drinking alcohol and hitting another person in the home would bear on court's declination decision. The alleged abuse is also not abuse relating to defendant, but to his sister Kristi and brother Jeremy. Defendant fails to articulate how abuse of his older siblings affected the Kent factors.

Defendant also throws out to this court a neuropsychological exam but makes no effort to explain how this report would change the outcome of the "decline" hearing. While the report does explain the existence of some type of head injury, the report also states that the defendant is of average intelligence and will likely "not demonstrate difficulty in problem solving and reasoning." (Defendant Ex. 25, at page 7). There is no explanation or recommendation from this expert as to how this affected defendant's judgment and abilities at the time of the incident. Nor is there elaboration as to how this recent discovery interplays with the Kent factors. The defendant should not try to open a reference hearing as a fishing expedition. In a personal restraint petition defendant bears the burden of persuasion and proof and he has not met it in this case. As argued *infra*, this information is also merely cumulative.

d. The material is cumulative.

A thorough review of the decline record shows that the hearing included facts about the defendant's family life, upbringing, and intellectual capability, and therefore the new information is merely cumulative.

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i. Record at decline.

In preparation for the decline hearing probation officer Tara Varela examined defendant's "social file" which contains school and detention records, family history, drug and alcohol evaluation, counseling records and mental health professional records. 2/14/01, RP 361. She contacted both parents and spoke with them at great length. RP 364-65. Ms. Varela reported to the court the divorce and custody battle and that the "kids seemed to be impacted by that." RP 365, 368. The mother, Mrs. Campbell, was described as the less strict of the two and had a more "free flowing environment." RP 365. The father, Marshall Hegney, was considered to be the more strict parent and the defendant did not react well to his father's more disciplined home. RP 370. Despite the father's efforts to be very active in his life, the defendant rebelled against his father the last year he was with him and "spiraled downward." RP 370.

According to Ms. Varela, defendant then chose to live with his mother because he was having "family problems," and "things weren't going well there." RP 371. Defendant did not elaborate further. RP 381-82. Although the father did not want his son to leave, he tried to give him incentives to pass classes by agreeing for him to give his mother's home another try. RP 371. Despite this attempt, the defendant failed all of his classes. RP 371.

Ms. Varela concluded that there was not adequate parental supervision and many times there was no supervision in either the mother or father's home. RP 367-68.

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Defendant reported to Ms. Varela that his brother introduced him to drugs. RP 367. Defendant also reported a CPS referral because "his sister had some problems growing up and . . . made a false report to CPS in regards to abuse by her mother." RP 367.

After staffing the defendant's case with other probation officers it was determined that probations' unanimous recommendation was for declination. RP 386.

The defense expert, Ms. Klingbeil, recommended against decline. RP 504. In making this determination she conducted a standard psychosocial evaluation, met with the defendant twice, reviewed discovery, his school records, and interviewed his mother, sister Kristy, and father. RP 504-505. Ms. Klingbeil explored with the court the difficulty the divorce caused in defendant's life:

> Well, I think Justin presents a not unusual pattern . . . He comes from a home situation that was a perfect setup to be part of the etiology behind the kid he is today. His parents – he was born in 1985. His parents divorced in 1986. Although he was with his mother as a custodial parent for many years, he went back and forth a great deal, and particularly in later years as an adolescent, he was more in control of the living situation than I think either parent was.
>
> His sister and I talked a fair amount about this as sort of the ping pong ball effect, that is, he went back and forth. When things got tough with his mother, he went to his dad's. Things were always tough with his dad, so he wanted to go to his mother, and this was a setup in many respects for the instability in his emotional life. Certainly not the only thing.

RP 511.

When pressed from the court as to what Ms. Klingbeil meant by a father that was "extremely punitive and strict," Ms. Klingbeil clarified that the father would restrict him, "He's very rigid and has very high set of expectations." RP 562.

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It was Ms. Klingbeil's opinion that defendant was lower than average in intelligence based on her conversations with him and testing conducted. RP 564-65.

ii. Alleged new information.

Defendant brings before this court DSHS records, an certification from his sister Kristina Myers and brother Jeremy Hegney, as well as a neuropsychological report.

Kristina Myers.

Kristina Myers states that she is unaware of whether Karil Klingbeil contacted her regarding Justin. However, according to Ms. Klingbeil's testimony, Ms. Myers was contacted in preparation for the decline hearing and consulted. RP 504-505. Ms. Meyers reported a back and forth, ping-pong relationship between the children and the two homes, as was reported at the decline hearing. (Defendant's exhibit 20, Certification of Kristin Myers at Page 1), RP 511. Ms. Meyers reports that her mother drank a lot of alcohol in front of the children, without reporting whether she had an alcohol problem or if it affected her parenting. Ms. Meyers also reports physical abuse directed at her and Jeremy, not Justin, and that this abuse was in the form of "hitting." Certification at 2. She reports an incident where her mother knocked her down the stairs but that she recanted due to fear of being in foster care. Certification at 3.

Jeramy Hegney

Jeramy Hegney reports physical abuse from his father, but again this abuse did not involve his brother Justin. (Defendant's Ex. 21, Certification of Jeramy Hegney at 2). His mother drank alcohol but she did not have a drinking "problem." Id.

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Neuropsychological Report

The neuropsychological report reveals that, (1) with intellectual abilities, defendant did not have any significant intellectual loss, (page 2) (2) he had mild constructional dyspraxia and right hemisphere dysfunction, (page 3) (3) there was slight evidence of malingering or a tendency to over represent himself in a negative or pathological manner (page 4 and 6) , (4) there is evidence of closed head injury but that in spite of this "it is noted that he will probably not experience significant problems with daily function and adaptive abilities. He will likely not demonstrate significant difficulty in problem solving and reasoning," (page 6-7) (5) that defendant's abilities for processing information, attention, and concentration, formulating appropriate action, and integrating feedback are seen to be mildly impaired," but bilaterally his native intelligence is within normal limits (Page 7), (6) that there is no recommendation for further testing unless there is a significant negative change in abilities. (Page 7) (Defendant's Exhibit 25).

iii. Comparison

A comparison of the two records shows that the alleged new information is merely cumulative. Probation officer Ms. Varela had before her the defendant's social file and family history when considering the decline decision. RP 361. The court was informed that the defendant was having family problems and that his brother and sister provided a less than stable environment. RP 367, 381-82. Ms. Varela pointed out to the court that *neither* parent was providing adequate supervision. RP 367-68. Defendant's

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own expert opined that his home situation was the "perfect setup" for where defendant found himself. RP 511. Defense expert also made the court aware of the defendant's lower than average intelligence. RP 564-65.

While the court did not have to necessarily consider any of this family background when making the decline determination, it certainly was made aware of the less than adequate parental supervision and the defendant's ability to manipulate this to his advantage.

Defendant has failed to meet his burden of establishing that the information rises to the level of new evidence demanding relitigation of the decline determination in this matter.

6. THE DECLINE PROCEDURE DOES NOT VIOLATE PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER STATE, FEDERAL, OR INTERNATIONAL LAW.

a. International law does not bind this court.

Defendant overstates the "binding" nature of international law either federally or locally. Although "international law is a part of the law of the United States," The Paquete Habana, 175 U.S. 677, 700, 83 S. Ct. 1194, 44 L. Ed. 32083 S. Ct. 1194 (1900), a court is bound by a properly enacted constitutional statute, even if that statute violates international law. See United States v. Aguilar, 883 F.2d 662, 679 (9th Cir. 1989) ("In enacting statutes, Congress is not bound by international law; if it chooses to do so, it

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may legislate contrary to the limits posed by international law."), cert. denied, 498 U.S. 1046, 111 S. Ct. 751, 112 L. Ed. 2d 771 (1991).

All three of the international bodies of law which defendant cites to this court are in fact not binding to any court in this land. While the International Covenant on Civil and Political Rights (ICCPR) is a binding source of international law, the United States ratified the Covenant on the express understanding that it did not itself create obligations enforceable in American courts. See Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S. Ct. 2739, 2767, 159 L. Ed. 2d 718 (2004). The Senate also made actual reservations under which its obligations to comply with various provisions of the ICCPR were limited. See 138 Cong. Rec. S4781, S4783; Igartua-de la Rosa v. United States, 417 F.3d 145, at 174, 2005 U.S. App. LEXIS 15944 (1st Cir. P.R. 2005) (Torruella, dissenting) (stating, *inter alia,* that including in the reservations was Congress's reserving the right to treat juveniles, under certain circumstances, as adults, notwithstanding the provisions of ICCPR Article 10, Paragraphs 2(b) and 3, and Article 14, Paragraph 4).

The Convention on the Rights of the Child has not been ratified at all and United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), are not legally binding but are "designed to serve as convenient standards of reference," U.N. G.A. Res. 40/33, 40th Sess., Agenda Item 98, U.N. Doc. A/RES/40/33 at art. 5 (Dec. 14, 1990); Article Trying The Future, Avenging The Past: The Implications of Prosecuting Children For Participation In Internal Armed Conflict, 28 Colum. Human Rights L. Rev. 629 (1997).

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At most, the defendant may invite this court to look to "views of the international community" for guidance in determining whether something constitutes cruel and unusual punishment under the Eighth Amendment. See Thompson v. Oklahoma, 487 U.S. 815, 832, at n. 31,108 S. Ct. 2687, 101 L.Ed.2d 702 (1988).

b. Discretionary decline of a 15 year old for felony murder does not constitute cruel and unusual punishment.

The Eighth Amendment to the United States Constitution bars cruel and unusual punishment. Article I, section 14 of this state's constitution bars cruel punishment. The state constitutional provision barring cruel punishment is more protective than the Eighth Amendment. State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996).[5] The Eighth Amendment prohibition against cruel and unusual punishment generally does not take into consideration of the defendant's age, "only a balance between the crime and the sentence imposed." State v. Massey, 60 Wn. App. 131, 145, 803 P.2d 340 (1990), cert. denied, 499 U.S. 960, 111 S. Ct. 1584, 113 L. Ed. 2d 648 (1991), cited with approval in In re Boot, 130 Wn.2d 553, 569-70, 925 P.2d 964 (1996). "The test is whether in view of contemporary standards of elemental decency, the punishment is of such disproportionate character to the offense as to shock the general conscience and violate

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[5] Since the main thrust of defendant's argument is that the punishment is "cruel" this is a distinction without a meaning. (PRP at 41 "Massey, [*supra*] needs to be reconsidered in light an [sic] evolving international consensus that such punitive sanctions imposed on children are in fact cruel.").

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THE STATE OF WASHINGTON, Respondent, v. JUSTIN MICHAEL HEGNEY, Appellant. THE STATE OF WASHINGTON, Respondent, v. JESSE REPHEAL HILL, Appellant.

Nos. 28457-0-II and 28543-6-II Consolidated with No. 28527-4-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2004 Wash. App. LEXIS 682

April 22, 2004, Decided

PRIOR HISTORY: *State v. Hegney, 121 Wn. App. 1012, 2004 Wash. App. LEXIS 1492 (2004)*

DISPOSITION: Affirmed.

COUNSEL: [*1] COUNSEL FOR APPELLANTS: Suzanne Lee Elliot, Attorney at Law, Seattle, WA. Wayne Clark Fricke, Attorney at Law, Tacoma, WA.

COUNSEL FOR RESPONDENTS: Donna Yumiko Masumoto, Attorney at Law, Tacoma, WA. Kathleen Proctor, Tacoma, WA.

JUDGES: MORGAN, J. HUNT, J., QUINN-BRINTNALL, C.J.

OPINIONBY: MORGAN

OPINION:

UNPUBLISHED OPINION

MORGAN, J. - Jesse Hill and Justin Hegney appeal their convictions for first degree felony murder. The predicate offense was robbery. We affirm.

On August 19, 2000, a barbeque was held at Terry Hunt's house. Attendees included Hunt, Robert Hernandez (Robert), Manuel Hernandez (Manuel), Jamar Spencer, Charles Neely, Justin Hegney, Kashif Oyeniyi, and Elisha Thompson. Hegney was then 15 years old. n1

n1 Hegney's birthdate is June 5, 1985.

Sometime after 10 P.M., the group went looking for someone to assault. While roaming the area on foot, they were joined by Jesse Hill, age 14, n2 and Jermaine Beaver. Near North 4th Street and North M Street, they spotted a pedestrian named Erik Toews. After Spencer [*2] asked Toews for a cigarette, Hunt hit him on the head and knocked him down. The group then kicked and hit Toews until he got up and ran. Some of the group caught him almost immediately, whereupon Hunt again hit him in the head, knocked him down, and began "knee-dropping" him. Some of the others also continued to assault and rob him. Six days later, Toews died from his injuries.

n2 Hill's birthdate is October 30, 1985.

A man named Robin Henry witnessed part of these events. Looking out his apartment window, he saw a group of young people. After watching them for a minute or two, he heard one warn the others, "somebody is looking out the window," and they all fled at the same time. n3 He saw a man lying in the street, so he called 911.

n3 XIV Report of Proceedings (RP) (Jan. 9, 2002) at 1793.

Hegney told the police that he and others [*3] had kicked and hit Toews. Their purpose was to keep him from getting up, so theycould rob him. As he was kicking and hitting Toews, others were trying to steal from Toews' pockets. He claimed that some but not all ran when they saw Henry watching; that he was one of the ones who ran; and that he was not there when Hunt knocked Toews down the second time. After trying to call Hunt on a cell phone, he returned to Hunt's house.

Hill told the police that everyone had participated equally-except him. He denied hitting Toews but admitting stealing marijuana from him. He said that Robert took Toews' marijuana pipe and that someone else took

Toews' cigarettes. As he left, he said, some of the others were still beating Toews.

Beaver told the police that everyone except he and Thompson had kicked and hit Toews. Beaver said that Hegney might not have been involved, but that Hill had assaulted and stolen from Toews. Beaver testified at trial that he had not seen Hegney kick Toews.

Spencer told the police that Hill, Manuel, and Robert kicked and hit Toews. Spencer also said that Hill kicked and hit Toews and went through Toews' pockets. Spencer stated in a June 2001 interview with defense counsel [*4] that Hill was present throughout the assault, and that Hill went through Toews' pockets as Robert and Hunt were hitting and kicking Toews. Spencer admitted kicking Toews and stealing $ 20 from him. Spencer also said, at various times, that he could not remember who had assaulted Toews, that Hegney was not present after Toews tried to run, and that Hill had not assaulted or stolen from Toews.

Oyeniyi told the police that everyone had assaulted Toews except him and Thompson. He later testified that he was unsure where Hegney was during the assault. He admitted that he had stolen from Toews.

In addition to telling the police about the Toews' incident, Hegney also told them about what the parties call the "duck pond" incident. On August 17, 2000, two days before the Toews incident, Hegney, Hunt, Robert, and Perry Dunham were all near a duck pond in Wright Park when Hegney let a man whom they did not know use Hegney's lighter. Hegney motioned to Hunt not to hit the man until the man returned the lighter. Once that was done, Hunt and Dunham hit the man, Robert kicked him in the groin, and Robert and Hunt stole from him. Hegney participated by kicking the man in the side.

The State asked [*5] the juvenile court to decline jurisdiction over Hegney, even though he was not yet 18. The juvenile court so ordered.

The State charged Hegney and Hill in adult court. It alleged that Hegney had committed first degree felony murder on August 19; that Hill had committed first degree felony murder on August 19; and that Hill had committed three additional robberies on August 17.

On August 10, 2001, Hegney and Hill moved for change of venue based on extensive pretrial publicity. On January 2, 2002, the court denied the motion, noting that the jurors indicated that they could make decisions "based on the evidence presented in court." n4

n4 XI RP (Jan. 2, 2002) at 1524.

On August 10, 2001, Hegney moved to sever his trial from Hill's. The trial court denied the motion.

On August 10, 2001, the State moved to admit evidence of the duck pond robbery. The trial court granted the motion over Hegney's objection, and the evidence was later admitted at trial.

In January 2002, a jury trial was held. Hegney and Hill were [*6] each found guilty of first degree felony murder. In addition, Hill was found guilty of first degree robbery. After sentencing, they each filed an appeal.

I.

The first issue is whether the trial court erred by remanding Hegney to adult court. On February 12, 2001, the juvenile court convened a decline hearing. Hegney's school principal testified that Hegney had many disciplinary problems, including harassing other students, and that he was "charismatic" but had problems with authority. The campus security officer testified that Hegney intimidated other students and that he was the leader among his friends. Hegney's teachers testified that he was manipulative, street smart, mature, and a leader; that he knew how to work the system; and that he intimidated and picked on others. The in take probation officer at juvenile court testified that Hegney had drug and alcohol problems, a lack of regret or remorse, and friends who were negative influences. Witnesses described the penalties, opportunities, and limitations of the juvenile and adult systems, and the juvenile court staff recommended that the juvenile court decline jurisdiction. On the other hand, a social worker retained by Hegney [*7] thought Hegney was not dangerous to society, could be rehabilitated, needed clinical treatment, and was immature. She emphasized his lack of prior record, saying that "history is by far the most profound peg to predict future dangerousness." n5 Although she described him as a "cocktail" personality who was manipulative, she concluded that the juvenile court should retain jurisdiction.

n5 4 Juvenile RP (Feb. 15, 2001) at 524.

On February 20, 2001, the juvenile court examined each *Kent* n6 factor and decided Hegney should be tried as an adult. The court ruled:

> There is no dispute that this is an extremely serious offense. The taking of someone's life is the ultimate offense. .
>
> The facts clearly support the conclusion that this offense was committed in an aggressive, violent and willful manner. .

Erik Toews died as a result of the offense. There can be no greater injury than death.

This court believes that there is prosecutive merit to the complaint. While the defense has presented testimony to [*8] support their position that Justin did not participate in the crime, he did confess on tape to kicking Erik Toews. There is evidence that Justin knew the group was out to beat someone up. There is evidence that he had participated in prior assaultive behaviors. There is evidence that on prior occasions, items had been taken from the victims of prior assaults.

This court believes that [the factor regarding the desirability of trial and disposition of the entire case in one court] is neutral with regard to this case.

... It is apparent to this court that Justin Hegney has asserted his maturity in the many aspects of his life and also evidenced immaturity in many aspects of his life..

While Justin does not have significant prior contacts with the justice system, and arguably this factor weighs in favor of retaining jurisdiction, this court is giving little weight, as it appears Justin's illegal actions were escalating rapidly...

[The social worker] testified that Justin was not a danger to society because of his lack of prior similar incidents and his lack of involvement in the attack on Erik Toews. I do not find her testimony credible in that regard. The testimony shows that [*9] Justin has been a danger and has been involved with dangerous .....

[Justin's] ability to manipulate situations and people causes great concern to this court. Whatever treatment he needs, this court does not believe it could be appropriately dealt with in [the juvenile system], and this court does not believe that the public would be adequately protected should he be retained in the juvenile justice system even until he turns 21. n7

The court later entered written findings of fact and conclusions of law, and this court denied Hegney's motion for discretionary review.

n6 *Kent v. United States, 383 U.S. 541, 566-67, 86 S. Ct. 1045, 16 L. Ed. 2d 84, 86 (1966)* (delineating the factors to analyze when determining whether the juvenile court should decline jurisdiction).

n7 4 Juvenile RP (Feb. 20, 2001) at 643-49.

Hegney now urges that the juvenile court's findings of fact regarding sophistication and maturity, the seriousness of the offense, and the preferable disposition [*10] of the case are erroneous. This is so, he says, because he had no pnor record; because he is only three months older than Beaver, with whom the State chose to make a plea deal; and because the juvenile court chose to retain jurisdiction over four of the other participants.

A juvenile court may decline jurisdiction if it finds, by a preponderance of the evidence, "declination [is] in the best interest of the juvenile or the public." n8 The court must consider the following factors:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint...

5. The desirability of trial and disposition of the entire offense in one court...

6. The sophistication and maturity of the Juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and [*11] previous history of the juvenile....

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile . . . by the use of procedures, services and

facilities currently available to the Juvenile Court. n9

We will reverse findings of fact only if they are not supported by substantial evidence, n10 and we will reverse the trial court's conclusions, only if it abused its discretion. n11

n8 *RCW 13.40.110(2).*

n9 *Kent, 383 U.S. at 566-67.*

n10 *State v. M.A., 106 Wn. App. 493, 499, 23 P.3d 508 (2001).*

n11 *State v. Toomey, 38 Wn. App. 831, 834, 690 P.2d 1175 (1984), review denied, 103 Wn.2d 1012, cert. denied, 471 U.S. 1067, 85 L. Ed. 2d 501, 105 S. Ct. 2145 (1985)]; State v. Holland, 98 Wn.2d 507, 516, 656 P.2d 1056 (1983).*

The first three factors are met here. The offense was a stranger-to-stranger murder committed in an [*12] aggressive and violent manner, it was committed against a person, and it resulted in death.

The fourth factor is also met here. The evidence included confessions and statements from other participants, and Hegney admitted on tape that he kicked Toews.

The fifth factor was essentially neutral. Some of the other participants were being tried in adult court, and.some in juvenile court.

The sixth factor is met here. Testimony from Hegney's teachers and others demonstrated that Hegney was mature and thus a leader; that he disliked rules; and that he had harassed and intimidated others.

The seventh factor was not met here, for Hegney had not previously been involved

with the juvenile system. But substantial evidence supports the court's decision not to give this factor significant weight because, in the period before the murder, Hegney's "illegal actions were escalating rapidly." n12

n12 4 Juvenile RP (Feb. 20, 2001) at 647.

Finally, the eighth factor, a highly discretionary one, was also met here. Although [*13] the court found that Hegney could probably be rehabilitated, it also found that he manipulated and intimidated other people, and that his needs for counseling and group treatment would not be addressed in the juvenile system.

The court properly addressed the *Kent* factors, and its factual determinations were based on substantial evidence. Although a social worker concluded that Hegney was not a danger to society because he had no criminal history, and that the juvenile court should retain jurisdiction, the court was not obligated to accept that testimony. n13 The court did not abuse its discretion.

n13 *See Toomey, 38 Wn. App. at 837* (court shall consider expert testimony, but court makes the final decision).

II.

The next issue is whether the trial court erred by denying a change of venue. Local media covered the crime and the ensuing court proceedings. Some of the coverage was arguably inflammatory. n14 The articles became less frequent as time went on, but then reappeared when court [*14] proceedings commenced. According to both Hegney and Hill, this publicity so "saturated the community" that it violated their rights to fair trial. n15

n14 Hegney Clerk's Papers (CP) at 64, 72, 77, 78, 88 (articles labeling the incidents as "wilding"; alleging that the crimes were "thrill beatings"; alleging that the "Youths may feel little for victims" and "Lack of empathy for strangers is cited"; alleging that the youths "terroriz[ed] anybody walking by" and that the neighbors were "terrified"; alleging that Toews was just "one of at least 10 men recently beaten by bands of youths in the Hilltop and Stadium districts"). The Tacoma News Tribune opined that Hill had "shown complete disrespect for the rules of our society," and that he had played an "aggressive and violent" role in the crime. Hegney CP at 194, 196. Websites accessible to the public referred to the defendants as "scum." Hegney CP at 95.

n15 Br. of Hill at 8.

We review for abuse of discretion. n16 To determine whether the trial court [*15] abused its discretion, we analyze:

(1) the inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of

> the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury;
>
> (5) the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn. n17

n16 *State v. Clark, 143 Wn.2d 731, 756, 24 P.3d 1006, cert. denied, 534 U.S. 1000, 151 L. Ed. 2d 389, 122 S. Ct. 475 (2001).*

n17 *State v. Crudup, 11 Wn. App. 583, 587, 524 P.2d 479, review denied, 84 Wn.2d 1012 (1974).*

[*16]

The fourth and fifth factors are dispositive here, as "the best test of whether an impartial jury could be empaneled [is] to attempt to empanel one." n18 The trial court permitted two written questionnaires and nine days of extensive oral interrogation. It frequently admonished the jurors to ignore any outside information about the trial. n19 Although most of the jurors had heard of the case, they did not remember much about it, had not followed it with much interest, denied preconceived opinions, and promised to base their decision on the evidence presented. n20 The court exercised great care in selecting the jury, and its efforts demonstrated that local jurors would be a fair panel.

n18 *State v. Hoffman, 116 Wn.2d 51, 72-73, 804 P.2d 577 (1991).*

n19 *State v. Jackson, 111 Wn. App. 660, 674, 46 P.3d 257 (2002)*, ("the trial court's exceptional care offset the difficulties . . . in final jury selection"), *aff'd, 150 Wn.2d 251, 76 P.3d 217 (2003).*

n20 *See State v. Rice, 120 Wn.2d 549, 558, 844 P.2d 416 (1993)* (irrelevant that majority of the prospective jurors had knowledge of the case); *Jackson, 111 Wn. App. at 676* ("the record shows no juror who, despite case knowledge, had such fixed opinions that they could not act impartially").

[*17]

The third, seventh, and ninth factors buttress this conclusion. The time between event and trial was 17 months, during much of which there was little publicity. n21 The media obtained much of its information from public records, judicial proceedings, and community interviews, and the trial court was careful to insure that none of the jurors had been exposed to a problematic statement made publicly by the Pierce County Prosecutor. The jury was drawn from a metropolitan county with more than 700,000 residents. n22 Even assuming that the remaining factors all favored a change of venue, the trial court did not abuse its discretion.

n21 *Cf Rice, 120 Wn.2d at 557* ("this court has not overturned denials of motions for change of venue when the trial took place 5 to 6 months after the murders") (citing *State v. Jeffries, 105 Wn.2d 398, 409, 717 P.2d 722* (6 months), *cert. denied, 479 U.S. 922, 93 L. Ed. 2d 301, 107 S. Ct. 328 (1986)*); *State v. Rupe, 101 Wn.2d 664, 675, 683 P.2d 571 (1984)* (5 months)).

n22 *Cf Rupe, 101 Wn.2d at 675* (63,000 pool is large); *Jackson, 111 Wn. App. at 676 (Spokane County is large enough pool to not favor venue change).*

[*18]

III.

The next issue is whether the trial court erred by denying Hegney's motion to sever his trial from Hill's. Hegney contends that Hill had given a taped statement implicating him in Toews' murder, and that the court's admission of that statement violated his right to confront the witnesses against him.

A defendant's right to confront witnesses is violated if he is "incriminated by a pretrial statement of a [non-testifying] codefendant." n23 That right is not violated, however, if the court redacts the non-testifying codefendant's statement so that it does not refer to the objecting defendant or contain pregnant deletions that impliedly refer to the objecting defendant, provided that the court gives a limiting instruction. n24 Consistently, *Criminal Rule 4.4(c)* states:

> (1) A defendant's motion for severance on the ground that an out-ofcourt statement of a codefendant referring to him is inadmissible against him shall be granted unless:
>
> ...

(ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

n23 *Hoffman, 116 Wn.2d at 75* (citing *Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968))*.

[*19]

n24 *Gray v. Maryland, 523 U.S. 185, 192, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998)* (impermissible to replace a name with an obvious blank, word, symbol, or other alteration, thereby implying reference to objecting defendant); *Richardson v. Marsh, 481 U.S. 200, 208, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987)* (confession redacted to omit all reference to the codefendant was permissible because the statement was incriminating only when linked to other evidence); *State v. Larry, 108 Wn. App. 894, 905, 34 P.3d 241 (2001), review denied, 146 Wn.2d 1022, 52 P.3d 521 (2002)*.

The statement in issue here was Hill's. Insofar as that statement was related to the jury, however, *Hill did not name Hegney*. Hill said that he "met up with Terry, Terry Hunt, Robert and Manuel Hernandez, Andrew Neely, Jamar [Spencer], and . . . Thompson [sic]." n25 Hill said that *"they* ran up and beat this guy up"; that *"they* were still beating up on the victim when he and Jermaine decided to go home"; that after Hunt knocked Toews down, *"the remainder of* [*20] *the guys* jumped the guy and began kicking and hitting him"; that *"everyone* else had equally participated in the assault"; *"everybody* else started jumping, jumping on him; *"everybody* else was hitting him"; and *"everybody* was hitting him." n26 Although Hegney asserts the contrary, these statements did not refer to him by name or otherwise; did not contain any blanks or obvious deletions; and were accompanied by a limiting instruction. n27 Thus, the trial court did not err by admitting them.

n25 XVI RP (Jan. 14, 2002) at 2219.

n26 XVI RP (Jan. 14, 2002) at 2219-20, 2222-23, 2229, 2232 (emphasis added).

n27 Hegney CP at 759

IV.

The next issue is whether the trial court erred by admitting evidence about the "duck pond" robbery. Hegney argued to the trial court and reiterates to us that such evidence generated unfair prejudice that substantially outweighed its probative value. The trial court held to the contrary, reasoning in part that the incident showed "Hegney's knowledge as [*21] to how the group was going to react under certain circumstances." n28

n28 XI RP (Jan. 2, 2002) at 1505.

ER 404(a) excludes such evidence to the extent it shows a propensity to commit crimes. *ER 404(b)* does not exclude it to the extent it shows relevant knowledge. It is admissible to show such knowledge, so long as its tendency to show propensity (unfair prejudice) does not substantially outweigh its tendency to show knowledge (probative value). n29

n29 *See State v. Herzog, 73 Wn. App. 34, 48-50, 867 P.2d 648, review denied, 124 Wn.2d 1022, 881 P.2d 255 (1994)*.

Hegney contended at trial that he did not know the group intended to rob Toews after assaulting him, and thus that he was not an accomplice to robbery or first degree felony murder. Evidence of the duck pond incident supported a reasonable inference that [*22] Hegney knew that Hunt and others were going to rob Toews, just as Hunt and others had robbed the man at the duck pond. The trial court properly balanced probative value against unfair prejudice, and it did not abuse its discretion.

V.

The next issue is whether the evidence is sufficient to support Hegney's and Hill's convictions for first degree felony murder. Evidence is sufficient if, viewed in the light most favorable to the prosecution, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. n30

n30 *State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)*.

Hegney argues the evidence is insufficient to show "he had knowledge that a robbery was going to occur." n31 We disagree. When Hegney was interviewed by the police, he explained that he and others had assaulted Toews so they could steal from Toews. The evidence

amply supports inferences that as the assault was occurring, various members of the group were stealing things from Toews-Hill, [*23] for example, admitted stealing marijuana from Toews. Hegney had been at the duck pond incident, during which another stranger had been assaulted and robbed. Taken in the light most favorable to the State, a rational trier could conclude that Hegney knew the group would rob Toews and that he knowingly participated in that activity.

n31 Br. of Hegney at 16.

Hegney argues that the evidence shows, so clearly reasonable minds could not differ, that the members of the group perpetrated two separate assaults and robberies on Toews; that he did not participate in the "second" assault and robbery; that the injuries that took Toews' life were inflicted during the "second" assault and robbery; and thus that his conduct did not cause Toews' death. n32 In our view, however, the evidence supports a reasonable inference that the entire group perpetrated one continuous assault and robbery in which Hegney was a knowing and willing participant. Assuming without holding that the evidence also supports a competing inference (i. [*24] e., that there were two assaults and robberies, in the second of which Hegney did not participate), the matter was for the jury to decide, and we perceive no ground on which to disturb its verdict.

n32 Br. of Hegney at 16 (asserting that Hegney's "participation ended prior to the infliction of the life-ending injury inflicted by Hunt and the others which was an intervening cause").

Hill argues that the evidence is insufficient to show that he knew Hunt or the others planned to assault or rob Toews. The evidence is sufficient to support Hill's conviction if, taken in the light most favorable to the State, it shows (1) that Hill perpetrated or knowingly aided in the robbery of Toews, and (2) that "in the course of or in furtherance of such [robbery] or in immediate flight therefrom," Hill or another participant caused Toews' death. n33 The evidence shows that Hill aided in robbing Toews, for Hill himself told the police that while others were beating Toews, he stole marijuana from Toews. Furthermore, the evidence [*25] shows that "in the course of or in furtherance of the robbery, one or more of the participants caused Toews' death. The evidence is sufficient to support Hill's conviction for first degree felony murder.

n33 *RCW 9A.32.030(1)(c).*

Citing *State v. Roberts* n34 and *State v. Cronin,* n35 Hill argues that knowingly aiding or abetting a robbery "does not impose strict liability for any and all offenses that follow," n36 and thus that he is not guilty of first degree felony murder merely because he knowingly participated in an assault and robbery. He argues that he "must have acted with knowledge that he or she was promoting or facilitating" Toews' murder, n37 and "that he was not guilty of felony-murder as a principle [sic] or an accomplice because he did not plan, intend, or know of any plan or intent to kill anyone." n38

n34 *142 Wn.2d 471, 14 P.3d 713 (2000).*

n35 *142 Wn.2d 568, 14 P.3d 752 (2000).*

[*26]

n36 Br. of Hill at 21 (quoting *Roberts, 142 Wn.2d at 513*).

n37 Br. of Hill at 21 (quoting *Cronin, 142 Wn.2d at 579*).

n38 Reply Br. of Hill at 1.

Washington's complicity statute is *RCW 9A.08.020.* It generally provides that an accomplice is liable for the crime of a principal only if the accomplice knowingly encouraged the principal to commit that crime. n39 As a general rule then, an accomplice to one crime is not necessarily an accomplice to all crimes that happen to follow.

n39 *Roberts, 142 Wn.2d at 512-13* (accomplice must have "general knowledge" of principal's "specific crime"); *see also Cronin, 142 Wn.2d at 579* (same).

Washington's first degree felony murder statute provides an exception to this general rule. Enacted at the same time as the complicity statute, n40 and now codified as *RCW 9A.32.030(l)(c),* [*27] it provides that an accomplice to a robbery is liable for first degree felony murder if, "in the course of or in furtherance of [that robbery] or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants"; provided, however, that an accomplice can avoid liability if he or she shows, *as a defense,* that he or she did not "solicit . . . or aid the com-

mission" of the principal's homicidal act. n41 Essentially then, this statute provides that a robbery accomplice assumes the risk that a nonrobber might die during the robbery, even if there is no plan or intent to kill; and that the robbery accomplice will be liable for the death whether or not he knew of a plan or intent to cause it.

n40 LAWS OF 1975, 1ST EX. SESS. CH. 260, *§§ 9A.08.020, 9A.32.030.*

n41 *RCW 9A.32.030(l)(c)(i).* The accomplice must also meet additional requirements not pertinent here. *See RCW 9A.32.030(l)(c)(ii)*-(iv). No one argues, nor could he argue, that the defense was established in this case so clearly that reasonable minds could not differ.

[*28]

The Washington State Supreme Court recognized this exception in the *Roberts* and *Cronin* cases: Although it reversed the intentional murder convictions of accomplices who lacked "general knowledge" of the principal's plan to kill; it affirmed the felony murder convictions of those same people. n42

n42 *Roberts, 142 Wn.2d at 478, 534; Cronin, 142 Wn.2d at 570, 586.*

State v. Israel, n43 a case Hegney relies on, involved crimes other than felony murder. Thus, it involved the general rule laid down by *Roberts* and *Cronin,* not the exception recognized therein.

n43 *113 Wn. App. 243, 54 P.3d 1218 (2002), review denied, 149 Wn.2d 1013, 1015, 69 P.3d 874 (2003).*

Mitchell v. Prunty, n44 a case Hill relies on, is simply unclear. It does not indicate whether it involved intentional [*29] murder or felony murder, so it is not helpful here.

n44 *107 F.3d 1337 (9th Cir.), cert. denied, 522 U.S. 913, 139 L. Ed. 2d 227, 118 S. Ct. 295 (1997), overruled in part by Santamaria v. Horsley, 133 F.3d 1242 (9th Cir. 1998).*

In summary, the evidence is sufficient to support findings that Hegney and Hill participated in the assault and robbery of Toews; that the group stayed together, so that everyone was present during that event; and that Hegney and Hill knew the group meant to rob Toews because the group (or some of its members) had engaged in similar, concerted conduct in the past. The jury had the authority to sift the evidence, assess credibility, and decide whether those findings should be made. We have no reason to disturb its verdicts, and we decline to do so.

VI.

The next issue is whether the trial court properly instructed the jury on accomplice liability. The trial court instructed:

> A person who is an accomplice in the commission of the crime is guilty of that crime whether present [*30] at the scene or not.
>
> A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. n45

n45 Hegney CP at 729.

Even though this instruction properly stated the elements of accomplice liability, n46 Hegney and Hill argue that the trial court erred by not also giving the last paragraph of Hegney's proposed instruction 11 n47 That paragraph provided:

> Knowledge of an accomplice [*31] that the principal intended to commit a particular crime does not impose strict liability for any and, all offenses that follow. An accomplice must have the pur-

> pose to promote or facilitate the particular conduct that forms the basis for the charge and the accomplice is not liable for conduct that does not fall within this purpose. n48

n46 *In re Personal Restraint of Sarausad, 109 Wn. App. 824, 838-39, 39 P.3d 308 (2001)*; *State v. Mullin-Coston, 115 Wn. App. 679, 690-91, 64 P.3d 40, review granted, 150 Wn.2d 1001, 77 P.3d 650 (2003).*

n47 The first several paragraphs of Hegney's proposed instruction were almost the same as the one the trial court gave. The only difference was that the proposed instruction did not contain the first sentence of the trial court's instruction.

n48 Hegney CP at 685 (Instruction 11).

We reject this argument. The court's instruction told the jury that Hegney and Hill each could be an accomplice to robbery "if with knowledge [*32] that it will promote or facilitate the commission of the crime," he encouraged or aided another person in committing that crime. The court's first degree felony murder instruction properly told the jury that if Hegney and Hill each was an accomplice to a robbery in the course of which another participant caused Toews' death, Hegney and Hill were liable for felony murder. Neither Hegney nor Hill was entitled to more, and the trial court did not err by instructing as it did.

Hill argues that "the only real issue was whether or not [he] had any intent to rob or kill Toews." n49 For reasons already stated, however, the issue was his intent to rob or knowingly encourage a robbery, not his intent to kill. He was charged with *felony* murder occurring in the course of a robbery, not with intentional murder.

n49 Br. of Hill at 27.

Hill argues that the trial court "should have utilized Instruction 6 as proposed by the defense," n50 and the court erred by not so doing. He does not quote proposed instruction 6, [*33] n51 he does not tell us where to find it in the record, n52 and he neglected to number the proposed instructions that he included in the record. If he is reiterating Hegney's argument about the omission of Hegney's proposed instruction 11, we ruled above. If he is arguing something else, we cannot tell what that is. The trial court did not err in the way that it instructed the jury.

n50 Br. of Hill at 27.

n51 *See RAP 10.4(c)* (party who presents issue requiring study of jury instruction should include that instruction in brief on appeal).

n52 *See RAP 10.4(f)* ("A reference to the record should designate the page and part of the record.").

VII.

The last issue is whether the prosecutor prejudicially misstated the law during closing argument Hill's attorney argued "anyone who doesn't want to participate in the level of crime that the person is contemplating can opt out of the crime, can disassociate themselves from the group and not participate in that particular crime," even though nothing [*34] in the instructions stated such a concept. n53 The prosecutor replied:

> Once you're an accomplice and someone dies in. the course of or in the furtherance of or immediate flight from the crime, you are liable for the murder.
>
> Well, let's look at that language a little bit, about in the course of, in the furtherance of or in the immediate flight therefrom. You'll notice that casts a broad net. It covers the whole crime from the start to the actual exent itself, up until the point that they are even fleeing from the scene: It's a continuous chain of liability, so to speak. . . . It encompasses everything that happened out there from when Erik Toews was first beaten down on the ground to the time he's being kicked and pummeled, to the time his pockets are being gone through, to the time that he miraculously is able to get up and run, but not very far, to the time he's beaten again, up until the time these folks all leave the scene. That rule, that law covers every step of the way, in the course of, in the furtherance of or in immediate flight from. There's no exception to that. There is no loop hole to that, and what the defense attorneys are asking you to do is to create a loop [*35] hole in the law that doesn't exist. n54

When defense counsel objected, the court told the jury "to go by the instructions that the court has given." n55 The prosecutor then continued:

> They are asking for an exception to the law that doesn't exist in there, because this law covers the entire progress, from the time they meet Erik out here, to the time they flee. And we know that Erik did, in fact, die or died as a result of injuries that were suffered that night. And therefore because he died at the hands of the participants, these defendants as they sit here are guilty of murder in the first degree, because' they helped out, they helped out with the robbery, they helped each other do n56

n53 XIX RP (Jan. 22, 2002) at 2593.

n54 XIX RP (Jan 22, 2002) at 2619-20.

n55 XIX RP (Jan. 22, 2002) at 2620.

n56 XIX RP (Jan. 22, 2002) at 2620.

These arguments were proper to the extent they reflected the parties' factual dispute over whether the incident involved one continuing [*36] assault and robbery, or two discrete assaults and robberies. These arguments were proper to the extent that Hegney and Hill was each' liable for felony murder if he knowingly aided or encouraged a robbery in the course of which Toews died. These arguments may have been' improper to the extent they involved "opting out" a matter on which the trial court did not instruct-but Hill's counsel invited response on that subject by opening it. Perceiving no error, we affirm the judgments entered below.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to *RCW 2.06.040*, it is so ordered.

MORGAN, J.

We concur:

HUNT, J.

QUINN-BRINTNALL, C.J.

APPENDIX "J"

Motion for Reconsideration

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE
JUVENILE COURT

STATE OF WASHINGTON, Plaintiff, vs. JUSTIN HEGNEY, Respondent.	No. 00-8-02561-8, 00-8-02128-1 MOTION FOR RECONSIDERATION

COMES NOW the respondent herein, Justin Hegney, by and through his attorney, Wayne C. Fricke of the Law Offices of Monte E. Hester, Inc., P.S., and requests that the court reconsider its decision declining jurisdiction in this matter.

THIS MOTION is based on the records and files herein and the fact that the Court improperly placed the burden on the respondent to demonstrate that treatment was not available in the juvenile system, as well as the other elements of the Kent standards.

DATED this 1ST day of March, 2001.

LAW OFFICES OF MONTE E.
HESTER, INC. P.S.
Attorneys for defendant

By _____
Wayne C. Fricke
WSB #16550

ORIGINAL

LAW OFFICES OF
MONTE E. HESTER, INC., P.S.
1008 SOUTH YAKIMA AVENUE, SUITE 302
TACOMA, WASHINGTON 98405
(253) 272-2157

APPENDIX "K"

Affidavit of Tara Varela for Respondent

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF:	NO. 34085-2-II
JUSTIN MICHAEL HEGNEY, Petitioner.	AFFIDAVIT OF TARA VARELA FOR RESPONDENT

STATE OF WASHINGTON)
: ss.
COUNTY OF PIERCE)

The undersigned, being first duly sworn upon oath, deposes and says:

1. I was the probation officer assigned to the matter of Justin M. Hegney, juvenile cause number 00-8-02128-1, which was set for a declination hearing.

2. In preparation for a declination hearing I will sometimes attempt to obtain State records through the Department of Social and Health Services. Usually this is a timely process and can take several weeks before

Office of Prosecuting Attorney
30 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

obtaining. As such we do not rely on the obtaining of such information for decline hearings.

3. In this matter, I requested Child Protective Services records on February 12, 2001, and according to a letter from DSHS Bob Matz, I received Hegney's records some time around February 23, 2001.

4. I provided a copy of these records to Wayne Fricke, counsel for defendant, sometime prior to March 2, 2001, when the presentation of findings of fact and conclusions of law were entered on the decline motion. I recall driving to his office with the documents some time after the decline hearing but before presentation of the findings.

Further your affiant sayeth naught.

Tacoma, Washington.

DATED March 13, 2006

Tara Varela
TARA VARELA

SUBSCRIBED AND SWORN to before me this 13th day of March 2006 ~~June, 2005.~~

SUE MITCHELS NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 12-5-06

Sue Mitchels
NOTARY PUBLIC, in and for the
State of Washington, residing
at Pierce
My Commission Expires: 12-5-06

Office of Prosecuting Attorney
30 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

Verdict Form E.

You must then fill in the blank provided in each of the remaining verdict forms, F, G, and H, with respect to Defendant JESSE HILL, with the words "not guilty" or the word "guilty," according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdicts to express your decision. The presiding juror will sign them and notify the judicial assistant, who will conduct you into court to declare your verdict.

APPENDIX "G"

Verdict Forms – Defendant Hegney

CLK999 744 00151

01-1-01150-4 15932239 VRD 02-01-02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. JUSTIN HEGNEY, Defendant.	**ORIGINAL** NO. 01-1-01150-4 FEB 0 1 2002 **VERDICT FORM A** **JUSTIN HEGNEY**

We, the jury, find the defendant, JUSTIN HEGNEY,

Guilty (Not Guilty or Guilty) of the crime of Murder in the First Degree as charged in Count I.

PRESIDING JUROR

FILED
DEPT. 18
IN OPEN COURT
JAN 28 2002
Pierce County Clerk
By DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

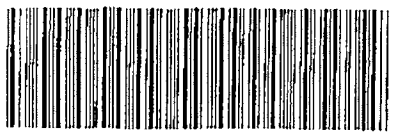
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. JUSTIN HEGNEY, Defendant.	NO. 01-1-01150-4 ORIGINAL FEB 01 2002 VERDICT FORM B JUSTIN HEGNEY

We, the jury, having found the defendant, JUSTIN HEGNEY, not guilty of the crime of Murder in the First Degree as charged, or being unable to unanimously agree as to that charge, find the defendant, JUSTIN HEGNEY, _____ (Not Guilty or Guilty) of the crime of Murder in the Second Degree as charged in the alternative in Count I.

_____

PRESIDING JUROR



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. JUSTIN HEGNEY, Defendant.	NO. 01-1-01150-4 **ORIGINAL** **VERDICT FORM C** **JUSTIN HEGNEY**

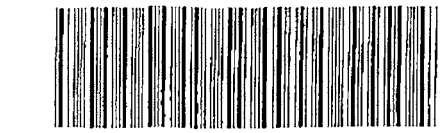
FEB 01 2002

We, the jury, having found the defendant, JUSTIN HEGNEY, not guilty of the crimes of Murder in the First Degree and Murder in the Second Degree, or being unable to unanimously agree as to those charges, find the defendant, JUSTIN HEGNEY,

_____ (Not Guilty or Guilty) of the lesser included crime of Robbery in the First Degree.

_____

PRESIDING JUROR



01-1-01150-4 15932273 VRD 02-01-02

)R COURT OF THE STATE OF WASHINGTON

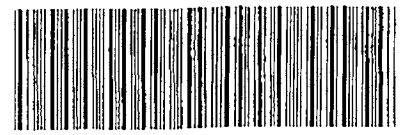
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. JUSTIN HEGNEY, Defendant.	NO. 01-1-01150-4 ORIGINAL FEB 01 2002 VERDICT FORM D JUSTIN HEGNEY

We, the jury, having found the defendant, JUSTIN HEGNEY, not guilty of the crimes of Murder in the First Degree, Murder in the Second Degree, and Robbery in the First Degree, or being unable to unanimously agree as to those charges, find the defendant, JUSTIN HEGNEY, _____ (Not Guilty or Guilty) of the lesser included crime of Assault in the Second Degree.

_____

PRESIDING JUROR



01-1-01150-4 15932287 VRD 02-01-02

: COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. JUSTIN HEGNEY, Defendant.	NO. 01-1-01150-4 **ORIGINAL** **VERDICT FORM E** **JUSTIN HEGNEY**

FEB 01 2002

We, the jury, having found the defendant, JUSTIN HEGNEY, not guilty of the crimes of Murder in the First Degree, Murder in the Second Degree, Robbery in the First Degree, and Assault in the Second Degree, or being unable to unanimously agree as to those charges, find the defendant, JUSTIN HEGNEY,

_____ (Not Guilty or Guilty) of the lesser included crime of Assault in the Third Degree.

_____

PRESIDING JUROR

APPENDIX "H"

Verdict Forms – Defendant Hill

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. JESSE HILL, Defendant.	FEB 01 2002 NO. 01-1-01989-1 **ORIGINAL** **VERDICT FORM A** **JESSE HILL**

We, the jury, find the defendant, JESSE HILL,

Guilty (Not Guilty or Guilty) of the crime of Murder in the First Degree as charged in Count I.

PRESIDING JUROR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. JESSE HILL, Defendant.	NO. 01-1-01989-1 VERDICT FORM B JESSE HILL

FEB 01 2002

ORIGINAL

We, the jury, having found the defendant, JESSE HILL, not guilty of the crime of Murder in the First Degree as charged, or being unable to unanimously agree as to that charge, find the defendant, JESSE HILL, _____ (Not Guilty or Guilty) of the crime of Murder in the Second Degree as charged in the alternative in Count I.

_____

PRESIDING JUROR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. JESSE HILL, Defendant.	NO. 01-1-01989-1 **VERDICT FORM C** **JESSE HILL**

FEB 01 2002

ORIGINAL

We, the jury, having found the defendant, JESSE HILL, not guilty of the crimes of Murder in the First Degree and Murder in the Second Degree, or being unable to unanimously agree as to those charges, find the defendant, JESSE HILL, _____ (Not Guilty or Guilty) of the lesser included crime of Robbery in the First Degree.

_____
PRESIDING JUROR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

FEB 01 2002

STATE OF WASHINGTON, Plaintiff, vs. JESSE HILL, Defendant.	NO. 01-1-01989-1 ORIGINAL **VERDICT FORM D** **JESSE HILL**

We, the jury, having found the defendant, JESSE HILL, not guilty of the crimes of Murder in the First Degree, Murder in the Second Degree, and Robbery in the First Degree, or being unable to unanimously agree as to those charges, find the defendant, JESSE HILL, _____ (Not Guilty or Guilty) of the lesser included crime of Assault in the Second Degree.

_____
PRESIDING JUROR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. JESSE HILL, Defendant.	FEB 01 2002 NO. 01-1-01989-1 ORIGINAL **VERDICT FORM E** **JESSE HILL**

We, the jury, having found the defendant, JESSE HILL, not guilty of the crimes of Murder in the First Degree, Murder in the Second Degree, Robbery in the First Degree, and Assault in the Second Degree, or being unable to unanimously agree as to those charges, find the defendant, JESSE HILL, _____ (Not Guilty or Guilty) of the lesser included crime of Assault in the Third Degree.

_____
PRESIDING JUROR

R COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. JESSE HILL, Defendant.	NO. 01-1-01989-1 ORIGINAL **VERDICT FORM F** **JESSE HILL** **REGARDING RICHARD RICE**

We, the jury, find the defendant, JESSE HILL, _____ (Not Guilty or Guilty) of the crime of Robbery in the First Degree as charged in Count II regarding the incident involving Richard Rice.

_____

PRESIDING JUROR

OR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. JESSE HILL, Defendant.	NO. 01-1-01989-1 **ORIGINAL** **VERDICT FORM G** **JESSE HILL** **REGARDING ELMER JOE**

We, the jury, find the defendant, JESSE HILL, _____ (Not Guilty or Guilty) of the crime of Robbery in the First Degree as charged in Count III regarding the incident involving Elmer Joe.

_____
PRESIDING JUROR

01-1-01989-1 15935740 VRD 02-04-02

IOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

FEB 01 2002

STATE OF WASHINGTON, Plaintiff, vs. JESSE HILL, Defendant.	NO. 01-1-01989-1 **ORIGINAL** **VERDICT FORM H** **JESSE HILL** **REGARDING MICHAEL GOUR**

We, the jury, find the defendant, JESSE HILL,

Guilty (Not Guilty or Guilty) of the crime of Robbery in the First Degree as charged in Count IV regarding the incident involving Michael Gour.

PRESIDING JUROR

FILED
DEPT. 18
IN OPEN COURT

JAN 28 2002

Pierce County Clerk
By DEPUTY

APPENDIX "I"

Unpublished Opinion

INSTRUCTION NO. 30

To convict the defendant, JESSE HILL, of the crime of Robbery in the First Degree as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 17th day of August, 2000, the defendant or an accomplice unlawfully took personal property, not belonging to the defendant or accomplice, from the person or in the presence of MICHAEL GOUR;

(2) That the defendant or an accomplice intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person;

(4) That the force or fear was used by the defendant or accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in immediate flight therefrom the defendant inflicted bodily injury; and

(6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 31

Evidence has been introduced in this case on the subject of three incidents that occurred on August 17, 2000, involving Richard Rice, Elmer Joe and Michael Gour for the limited purpose of determining whether Defendant Jesse Hill is guilty or not guilty of the robbery charges arising from these incidents. You must not consider this evidence for any purpose concerning Defendant Justin Hegney.

INSTRUCTION NO. 32

Evidence has been introduced in this case on the subject of an incident that occurred at the Duck Pond at Wright Park only for the purpose of determining whether on August 19, 2000, Defendant Justin Hegney had knowledge of a plan to assault and/or rob Erik Toews when Erik Toews was confronted. You must not consider this evidence for any purpose concerning Defendant Jesse Hill.

INSTRUCTION NO. 33

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 34

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 35

You may not consider an admission or incriminating statement made out of court by one defendant as evidence against a codefendant.

JURY INSTRUCTION NO. 36

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

JURY INSTRUCTION NO. 37

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 38

Upon retiring to the jury room for your deliberations of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and special verdict forms.

When completing the verdict forms, you will first consider the crime of Murder in the First Degree as charged for each defendant. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find a defendant guilty on Verdict Form A, do not use Verdict Forms B, C, D, or E. If you find a defendant not guilty of the crime of Murder in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will next consider the alternative crime of Murder in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form B the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

If you find a defendant guilty of the crime of murder but have a reasonable doubt as to which of two or more alternatives of that crime a defendant is guilty, it is your duty to find a

defendant not guilty of Murder in the First Degree on Verdict Form A, and to find a defendant guilty of Murder in the Second Degree, the alternative crime in Verdict Form B.

If you find a defendant guilty on Verdict Form B, do not use Verdict Forms C, D, or E. If you find a defendant not guilty on Verdict Form A or Verdict Form B, or if after full and careful consideration of the evidence you cannot agree on Verdict Form A or Verdict Form B, you will next consider the lesser included crime of Robbery in the First Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form C the words "not guilty" or the word "guilty," according to the decision you reach.

If you find a defendant guilty on Verdict Form C, do not use Verdict Forms D or E. If you find a defendant not guilty of the crime of Robbery in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will next consider the lesser included crime of Assault in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form D the words "not guilty" or the word "guilty," according to the decision you reach.

If you find a defendant guilty on Verdict Form D, do not use Verdict Form E. If you find a defendant not guilty of the crime of Assault in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will next consider the lesser included crime of Assault in the Third Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form E the words "not guilty" or the word "guilty," according to the decision you reach.

If you find a defendant guilty of the crime of assault but have a reasonable doubt as to which of two degrees of that crime the defendant is guilty, it is your duty to find a defendant not guilty on Verdict Form D and to find the defendant guilty of Assault in the Third Degree on

JURY INSTRUCTION NO. 24

To convict either the defendant Justin Hegney or the defendant Jesse Hill of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 19th day of August, 2000, the defendant or an accomplice intentionally assaulted Erik Toews;

(2) That the defendant or an accomplice thereby recklessly inflicted substantial bodily harm on Erik Toews; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

JURY INSTRUCTION NO. 25

A person commits the crime of assault in the third degree when under circumstances not amounting to assault in the second degree he with criminal negligence causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm or with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

JURY INSTRUCTION NO. 26

To convict either the defendant Justin Hegney or the defendant Jesse Hill of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 19th day of August, 2000, the defendant or an accomplice caused bodily harm to Erik Toews;

(2) That the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm;

(3) That the defendant or an accomplice acted with criminal negligence; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

JURY INSTRUCTION NO. 27

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Criminal negligence is also established if a person acts intentionally or knowingly.

INSTRUCTION NO. 28

To convict the defendant, JESSE HILL, of the crime of Robbery in the First Degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 17th day of August, 2000, the defendant or an accomplice unlawfully took personal property, not belonging to the defendant or accomplice, from the person or in the presence of RICHARD RICE;

(2) That the defendant or an accomplice intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person;

(4) That the force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice inflicted bodily injury; and

(6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 29

To convict the defendant, JESSE HILL, of the crime of Robbery in the First Degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 17th day of August, 2000, the defendant or an accomplice unlawfully took personal property, not belonging to the defendant or accomplice, from the person or in the presence of ELMER JOE;

(2) That the defendant or an accomplice intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person;

(4) That the force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice inflicted bodily injury; and

(6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13

Bodily injury, physical injury or bodily harm means physical pain or injury, illness or an impairment of physical condition.

INSTRUCTION NO. 14

Deadly weapon means any weapon, device, instrument, substance or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury.

INSTRUCTION NO. 15

A person commits the crime of Murder in the Second Degree when he or an accomplice commits or attempts to commit the crime of Assault in the Second Degree, and in the course of and in furtherance of such crime or in immediate flight from such crime he or an accomplice causes the death of a person other than one of the participants.

INSTRUCTION NO. 16

To convict either the defendant JUSTIN HEGNEY or the defendant JESSE HILL, of the crime of Murder in the Second Degree as charged in the alternative in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 19th day of August, 2000, ERIK TOEWS was assaulted and suffered injuries that resulted in his death on or about the 25th day of August, 2000;

(2) That the defendant or an accomplice was committing or attempting to commit the crime of Assault in the Second Degree.

(3) That the defendant or an accomplice caused the death of ERIK TOEWS in the course of and in furtherance of such crime or in immediate flight from such crime;

(4) That ERIK TOEWS was not a participant in the crime; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

A person commits the crime of Assault in the Second Degree when he or an accomplice intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon.

INSTRUCTION NO. 18

A person commits the crime of Attempted Assault in the Second Degree when, with intent to commit that crime, he or an accomplice does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 19

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

INSTRUCTION NO. 19A

A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly.

INSTRUCTION NO. 20

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

INSTRUCTION NO. 21

If you are not satisfied beyond a reasonable doubt that a defendant is guilty of the crime charged, a defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish a defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Murder in the First Degree necessarily includes the lesser crime of Robbery in the First Degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he shall be convicted only of the lowest crime.

INSTRUCTION NO. 22

To convict either the defendant Justin Hegney or the defendant Jesse Hill of the crime of Robbery in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(l) That on the 19th day of August, 2000, a defendant or an accomplice unlawfully took personal property from the person of another;

(2) That a defendant or an accomplice intended to commit theft of the property;

(3) That the taking was against the person's will by a defendant's or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person;

(4) That the force or fear was used by a defendant or an accomplice to obtain or retain possession of the property;

(5) That in the commission of these acts, a defendant or an accomplice inflicted bodily injury; and

(6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 23

If you are not satisfied beyond a reasonable doubt that a defendant is guilty of the crime charged, a defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish a defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Murder in the Second Degree necessarily includes the lesser crime of Assault in the Second Degree and Assault in the Third Degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he shall be convicted only of the lowest crime.

APPENDIX "F"

Court's Instructions to the Jury

URT OF THE STATE OF WASHINGTON
)R THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

JUSTIN HEGNEY and
JESSE HILL,

Defendants.

NO. [redacted]
01-1-01989-1

ORIGINAL

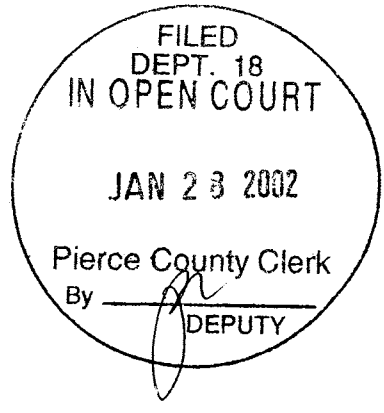
43

COURT'S INSTRUCTIONS TO THE JURY

DATED this 22d day of January, 2002.

Karen L Strombom

KAREN L. STROMBOM, JUDGE



INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendants of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the

testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

The defendants have entered a plea of not guilty. That plea puts in issue every element of the crimes charged. The State is the plaintiff, and has the burden of proving each element of the crimes beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant or each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

INSTRUCTION NO. 4

A person commits the crime of Murder in the First Degree when he or an accomplice commits or attempts to commit the crime of Robbery in the First Degree, and in the course of or in furtherance of such crime or in immediate flight from such crime, he or another participant causes the death of a person other than one of the participants.

INSTRUCTION NO. 5

To convict either the defendant JUSTIN HEGNEY or the defendant JESSE HILL of the crime of Murder in the First Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt;

(1) That on or about the 19th day of August, 2000, ERIK TOEWS suffered injuries that resulted in his death on or about the 25th day of August, 2000;

(2) That the defendant or an accomplice was committing or attempting to commit the crime of Robbery in the First Degree;

(3) That the defendant or an accomplice caused the death of ERIK TOEWS in the course of or in the furtherance of such crime or in immediate flight from such crime;

(4) That ERIK TOEWS was not a participant in the crime; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 6

A person who is an accomplice in the commission of the crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

INSTRUCTION NO. 7

A person commits the crime of Robbery in the First Degree when in the commission of a robbery or in immediate flight therefrom he or an accomplice is armed with a deadly weapon, or displays what appears to be a deadly weapon, or inflicts bodily injury.

INSTRUCTION NO. 8

A person commits the crime of robbery when he or an accomplice unlawfully and with intent to commit theft thereof takes personal property, not belonging to the defendant, from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property or to the person or property of anyone. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. The taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom it was taken, such knowledge was prevented by the use of force or fear.

INSTRUCTION NO. 9

A person commits the crime of Attempted Robbery in the First Degree when, with intent to commit that crime, he or an accomplice does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 10

A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.

INSTRUCTION NO. 11

A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 12

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

01-1-01150-4

Washington State, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 14 days after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you are registered on a weekly basis if you have been classified as a risk level II or III, or on a monthly basis if you have been classified as a risk level I. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level.

If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

DYM

5.8 **OTHER:** _____

_____

DONE in Open Court and in the presence of the defendant this date: 2.22.02

Donna Masumoto
Deputy Prosecuting Attorney
Print Name: DONNA MASUMOTO
WSB# 19703

Karen L. Strombom
JUDGE Print Name: KAREN L. STROMBOM

Wayne C. Fricke
Attorney for Defendant
Print name: Wayne Fricke
WSB# 11553

Justin Hegney / Justin Hegney
Defendant
Print name: Justin Hegney

FILED
DEPT. 18
IN OPEN COURT
FEB 22 2002
Pierce County Clerk
By _____ DEPUTY

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

01-1-01150-4

CERTIFICATE OF INTERPRETER

Interpreter signature/Print name: _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 01-1-01150-4

I, Bob San Soucie, Interim Clerk of this Court, certify that the foregoing is a full, true and correct copy of the judgment and sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed on this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No.: WA20203762 Date of Birth: 06/05/1985
(If no SID take fingerprint card for WSP)

FBI No. UNKNOWN Local ID No. _____

PCN No. _____ Other _____

Alias name, SSN, DOB: _____

Race:	Ethnicity:	Sex:
[ ] Asian/Pacific Islander	[ ] Hispanic	[X] Male
[ ] Black/African-American	[ ] Non-Hispanic	[ ] Female
[X] Caucasian		
[ ] Native American		
[ ] Other: _____		

trp

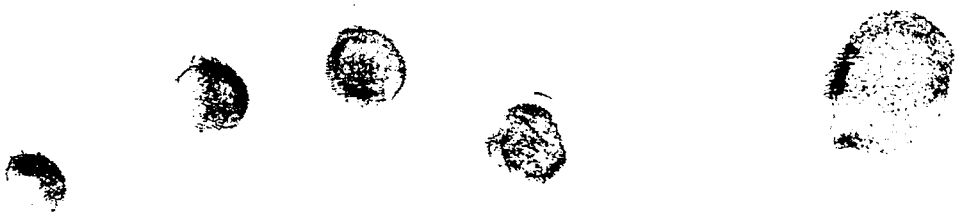
Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

01-1-01989-1

FINGERPRINTS

Right four fingers taken simultaneously | Right thumb

Left four fingers taken simultaneously | Left thumb



I attest that I saw the same defendant who appeared in Court on this Document affix his or her fingerprints and signature thereto. Interim Clerk of the Court, BOB SAN SOUCIE:

_____, Deputy Clerk.

Dated: 2

DEFENDANT'S SIGNATURE: Justin Hegney

DEFENDANT'S ADDRESS: _____

_____

DEFENDANT'S PHONE#: _____

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

APPENDIX "B"

Information

FILED
IN COUNTY CLERK'S OFFICE

AM MAR - 2 2001 P.M

PIERCE COUNTY, WASHINGTON
TED RUTT, COUNTY CLERK
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. JUSTIN MICHAEL HEGNEY, Defendant.	CAUSE NO. 01-1 01150 4 INFORMATION

DOB: 06/05/1985 SEX: MALE RACE: WHITE
SS#: UNKNOWN SID#: UNKNOWN DOL#: UNKNOWN

CO-DEF: ROBERT ANTHONY HERNANDEZ 00-1-04055-7
CO-DEF: TERRANCE LASHAWN HUNT 00-1-04054-9

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse JUSTIN MICHAEL HEGNEY of the crime of MURDER IN THE FIRST DEGREE, committed as follows:

That JUSTIN MICHAEL HEGNEY, in Pierce County, on or about the 19th day of August, 2000, did unlawfully and feloniously, while committing or attempting to commit the crime of ROBBERY IN THE FIRST DEGREE, and in the course of or in furtherance of said crime or in immediate flight therefrom, JUSTIN MICHAEL HEGNEY or an accomplice, did cause the death of Erik M. Toews, a human being, not a participant in such crime, on or about the 25th day of August, 2000, contrary to RCW 9A.32.030(1)(c) and 9A.08.020, and against the peace and dignity of the State of Washington.

AND IN THE ALTERNATIVE

I, GERALD A. HORNE, Prosecuting Attorney aforesaid, do accuse JUSTIN MICHAEL HEGNEY of the crime of MURDER IN THE SECOND DEGREE, committed as follows:

That JUSTIN MICHAEL HEGNEY, in Pierce County, on or about the 19th day of August, 2000, did unlawfully and feloniously, while committing or attempting to commit the crime of ASSAULT IN THE SECOND DEGREE, and in the course of and in furtherance of said crime or in immediate flight therefrom, JUSTIN MICHAEL HEGNEY or an accomplice, did beat Erik M. Toews with feet, fists and a stick,

ORIGINAL

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

thereby causing the death of Erik M. Toews, a human being, not a participant in said [illegible] out the 25th day of August, 2000, contrary to RCW 9A.32.050(1)(b) and 9A.08.020, and against the peace and dignity of the State of Washington.

DATED this 2nd day of March, 2001.

TACOMA POLICE DEPT CASE
WA02703

wsg

GERALD A. HORNE
Prosecuting Attorney in and for [illegible]ty
and State.

By: _____
W. STEPHEN GREGORI[illegible]
Deputy Prosecuting Attor[illegible]
WSB#: 5642

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

NO. 01 1 01150 4

DECLARATION FOR DETERMINATION

OF PROBABLE CAUSE

STATE OF WASHINGTON)
)ss
County of Pierce)

W. Stephen Gregorich, declares under penalty of perjury:

That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police report and/or investigation conducted by the Tacoma Police Department, case number 002321277 as well as contacts with homicide detectives David Devault and Larry Ihlen which provided me the following information:

At about 2232 hours, Saturday, 19 August 2000, in Tacoma, Pierce County, WA, a group of individuals to include defendants, Justin Michael Hegney(a declined juvenile),Terrance Lashawn Hunt (19) and Robert Anthony Hernandez (16), robbed and repeatedly beat victim Erik Michael Toews (30) with fists, feet and a stick, causing him to lapse into a deep coma and then die on 25 August 2000. During the course of the attack, victim Toews did not ever strike back at his attackers.

On August 19, 2000, a citizen looking out his window observed a disturbance outside his residence on North 4th Street. The witness saw a group of young males gathered in a circle on his street. After realizing that they were not just playing, the citizen noted the victim lying on the ground. Suspects were kicking and stomping on the prone individual, Toews. The observer called 911 and returned to his window. The assault was continuing. Apparently one of the attackers saw the witness and alerted the others; they all fled the scene. Police and medical aid arrived. Toews was transported from the scene to a local hospital. He later died as a result of injuries from the attack.

During a follow up investigation numerous persons, including participants, were interviewed. It was learned that most of the group of assailants had been at a barbeque at Hunt's home earlier in the evening. After the meal, the youths decided to find someone to "beat up". Most of the group, including defendants Hunt and Hernandez, had previously assaulted other persons during other evenings this summer. They assaulted persons for the excitement and entertainment it provided them. During those prior assaults, money and other property was sometimes taken from the victims. They left Hunt's house.

Juvenile respondent Jamar Spencer stated that Hunt saw a man that he wanted to beat up. Others in the group disagreed because of the man's location near a busy road. The group kept walking. Then they observed Toews. Hunt asked the others, "Do you want to get him?" According to Spencer everyone said "Yeah".

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Spencer distracted Toews by asking for a cigarette. One of the group "socked [Toews] in the jaw". Thereafter, Spencer stated, "And then everybody started stomping him and stuff. Hunt and R. Hernandez were the first assailants. Spencer concluded by stating, "And then me and Manuel and Justin[Hegney] and Andrew started kicking him." Spencer told the police that respondent Hill rifled Toews' pockets and stole some marijuana.

Justin Hegney made a statement to the police after being advised of his Miranda warnings. He stated that he had been at Hunt's house for a barbeque. He said that he, Hunt, Neely, Hill, the Hernandez brothers and Spencer left Hunt's house. While walking from Hunt's house, one of the group said, "Let's go get somebody." Hegney stated that Neely armed himself with a pole. They saw Toews and Hunt hit him. Hegney admitted, "Everybody, including myself, ran up and started kicking him." He saw Hill going through the victim's pockets.

At one point, the victim was able to get to his feet, and he tried to flee. However, Hunt ran after him and caught him. Hunt again struck the victim in the face causing him to fall to the ground again. It appeared that victim was unconscious as he was making a "snoring"-type noise. While unconscious, Hunt "knee dropped" victim in the face. Hunt counted out each knee drops as the blow were delivered. The youths stopped the assault only when they saw an adult in the window of a nearby apartment watching them. The group fled in different directions and ultimately returned to Hunt's home.

While victim was on the ground at least two of the group went through victim's pockets and removed cash (reportedly $20) and marijuana and a marijuana pipe.

Detectives have investigated other assaults/robberies committed by a group of youths in the same general area within a few weeks of the fatal attack on victim Toews. Hence, additional charges involving a common scheme or plan may be added.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: March 2, 2001.
PLACE: TACOMA, WASHINGTON

W. Stephen Gregorich, WSB# 5642

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APPENDIX "C"

Decline Order

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE
JUVENILE COURT

FILED
DEPT. 18
IN OPEN COURT
FEB 20 2001
Pierce County Clerk
By DEPUTY

STATE OF WASHINGTON, Plaintiff, vs. JUSTIN MICHAEL HEGNEY, DOB: 6/5/85 JUVIS #: 766240-R030 Respondent.	CAUSE NO. 00-8-02561-8 ORDER ON DECLINATION OF JUVENILE JURISDICTION

ORDER

The above-entitled matter came on regularly for hearing on the motion of the Prosecuting Attorney pursuant to RCW 13.40.110. The State was represented by DONNA MASUMOTO and ROSALIE MARTINELLI. The Respondent was present and represented by his attorney, WAYNE FRICKE. The Court was fully advised in all matters. It is hereby

ORDERED that the State's motion for the declination of juvenile court jurisdiction is GRANTED. The respondent shall be and hereby is REMANDED to the adult criminal justice system for arraignment. It is further

ORDERED that the PIERCE COUNTY SHERIFF shall transport the respondent ot the Pierce County Jail for ~~arraignment~~ presentation & findings on March 2, 2001.

DATED this 20th day of February, 2001.

Kathleen L. Strombom
JUDGE

Presented by:

ORDER ON DECLINING
JUVENILE COURT JURISDICTION - 1

Respondent's attorney

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Juvenile Division
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APPENDIX "D"

Mandate

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

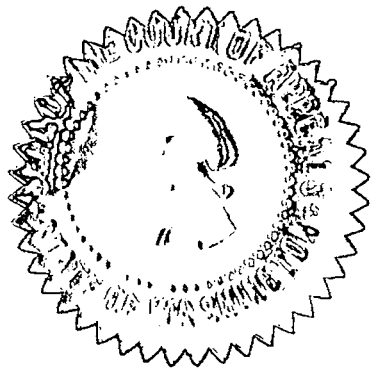
DIVISION II

STATE OF WASHINGTON, Respondent, v. JUSTIN MICHAEL HEGNEY, Appellant.	No. 28457-0-II consol w/ 28543-6-II and 28527-4-II MANDATE Pierce County Cause Nos. 01-1-01150-4, 00-8-02128-1, 01-1-01989-1
STATE OF WASHINGTON, Respondent, v. JESSE REPHEAL HILL Appellant.	

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on April 20, 2004 became the decision terminating review of this court of the above entitled case on November 30, 2004. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

Judgment Creditor Respondent State: $17.89
Judgment Creditor A.I.D.F.: $13,680.44
Judgment Debtor Appellant Hegney: $5,787.16
Judgment Debtor Appellant Hill: $7,911.17



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 17th day of December, 2004.

Clerk of the Court of Appeals,
State of Washington, Div. II

Suzanne Lee Elliott
Attorney at Law
705 2nd Ave., Ste 1300
Seattle, WA, 98104-1741

Wayne Clark Fricke
Attorney at Law
1008 S Yakima Ave Ste 302
Tacoma, WA, 98405-4850

Donna Yumiko Masumoto
Pierce Co Dep Pros Atty
930 Tacoma Ave S
Tacoma, WA, 98402-2171

Hon. Karen L. Strombom
Pierce Co Superior Court Judge
930 Tacoma Ave So
Tacoma, WA 98402

Dept. of Juvenile Rehabilitation
DSHS OFFICE BLDG 2
PO BOX 45720
OLYMPIA WA 98504-5720

APPENDIX "E"

Findings of Fact and Conclusions of Law
Re: Decline

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

JUVENILE COURT

STATE OF WASHINGTON, Plaintiff, vs. JUSTIN MICHAEL HEGNEY, DOB: 6-5-85 JUVIS #: 766240-R030 & R040 Respondent.	CAUSE NO. 00-8-02128-1 00-8-02561-8 **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DECLINATION HEARING**

THIS MATTER came before the Honorable KAREN L. STROMBOM for a Declination Hearing on the 12th through the 20th day of February, 2001, upon Informations charging the Respondent with Murder in the First Degree and Unlawful Possession of a Controlled Substance. The Respondent was present and represented by his attorney, Wayne Fricke. The State was represented by Donna Masumoto and Rosalie Martinelli, deputy prosecuting attorneys. The Court observed the demeanor and heard the testimony of the witnesses, has considered the arguments of counsel, and has been duly advised in all matters. The Court makes the following Findings of Fact and Conclusions of Law pursuant to the eight factors stated in Kent vs. United States, 383 U.S. 541, 12 L.Ed.2d 84, 86 S.Ct. 1045 (1966).

ORIGINAL 52

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FINDINGS OF FACT

I.

The first Kent factor requires consideration of the seriousness of the alleged offense to the community and whether the protection of the community requires declination. There is no dispute that the incident involving the death of Erik Toews is an extremely serious offense. The protection of the community requires declination, as will be further discussed below in Finding of Fact VIII.

II.

The second Kent factor is whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner. The facts support the conclusion that the offense was committed against Erik Toews in an aggressive, violent and willful manner. This factor weighs in support of declining jurisdiction.

III.

The third Kent factor is whether the alleged offense was against persons or against property, with greater weight being given to offenses against persons. Erik Toews died as a result of the offense. There can be no greater injury than death. This factor weighs in favor of declination.

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IV.

The fourth Kent factor is the prosecutive merit of the complaint. The Court finds that the complaint has prosecutive merit. There is evidence that the Respondent knew the group was out to beat someone up, and that the Respondent had participated in prior assaultive incidents in which items had been taken from the assault victims. The Respondent stated during a taped interview with the police that he had kicked Erik Toews during the beating and robbery of Mr. Toews. This factor weighs in favor of declination.

V.

The fifth Kent factor is the desirability of trial and disposition of the entire offense in one court when a respondent's associates are adults. Two of the Respondent's associates are presently set for trial in adult court, and three are presently set for trial in juvenile court. This factor is neutral and neither weighs in favor of, nor in opposition to, declination.

VI.

The sixth Kent factor is the sophistication and maturity of the juvenile determined by consideration of his home, environmental situation, emotional attitude and pattern of living. The Respondent asserted his maturity in many aspects of his life, and also evidenced immaturity in other aspects. While the Respondent has never held a job, paid bills or lived on his own at his own expense, the inquiry into maturity and sophistication does not end there.

The Respondent's personal life, largely unknown to his parents, involved the use of

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alcohol, cigarettes, marijuana and sexual activity. The Respondent consciously refused to participate in school and attended only for its social aspects. He chose to be a disrupter in class, chose to ignore classroom rules, and chose negative friends. He was himself a negative friend to others. He was a leader in certain groups and a follower in others. He has a history in school of harassing others. Outside of school, he had been involved in group activities that were illegal. He was not following the rules of either parent. The Respondent's actions are those of a young person who wanted to be an adult and who did things he considered to be adult. This factor weighs in favor of declination.

VII.

The seventh Kent factor is the record and previous juvenile history of the Respondent. The Respondent has had only one prior contact with the juvenile justice system which arose from his possession of marijuana on school grounds. With regard to this offense, the Respondent signed a diversion agreement on August 17, 2000, the day before the incident involving Ricardo Mendoza, and two days before the incident that led to Erik Toews's death. While the Respondent does not have significant prior contacts with the juvenile justice system, and arguably this factor weighs in favor of retaining juvenile jurisdiction, this court is giving little weight to this factor, as it appears that the Respondent's illegal actions were escalating rapidly at the time of the attack on Erik Toews on August 19, 2000.

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VIII.

The eighth Kent factor is the prospects for the adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile through services and facilities currently available to the juvenile court. The Court finds that the Respondent has been a danger to the community and has been involved with dangerous friends. The Respondent's ability to manipulate situations and people, as evidenced through the testimony of his teachers and the testimony of Karil Klingbeil, causes great concern to this court. The Respondent has many issues that require treatment; and this is shown through his school records, his actions and his choices. The Court finds that the Respondent's treatment needs would not be appropriately dealt with in JRA, the juvenile institution. The Court finds that the public would not be adequately protected should the Respondent be retained in the juvenile justice system even until he turns 21.

The Respondent's expert witness, Karil Klingbeil, testified that the Respondent is not a danger to society because of his lack of prior similar incidents and his lack of involvement in the attack on Erik Toews. The Court does not find Ms. Klingbeil's testimony credible in this regard. The foundation for this testimony was not supported by the evidence presented in court.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

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CONCLUSIONS OF LAW

I.

The Kent factors, taken as a whole, weigh in favor of the declination of juvenile court jurisdiction. Declination would be in the best interest of the public, and the Court accordingly orders that juvenile jurisdiction be declined over the Respondent.

DONE IN OPEN COURT this 2nd day of March, 2001.

KAREN L. STROMBOM,
JUDGE

Presented by:

DONNA MASUMOTO,
Deputy Prosecuting Attorney
WSBA #19700

FILED
DEPT. 18
IN OPEN COURT
MAR - 2 2001
Pierce County Clerk
By

Approved as to Form:

WAYNE FRICKE,
Attorney for Respondent
WSBA #16558

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

2 5 2002

STATE OF WASHINGTON, Plaintiff, vs. JUSTIN MICHAEL HEGNEY, Defendant.	CAUSE NO. 01-1-01150-4 WARRANT OF COMMITMENT 1) [ ] County Jail 2) [X] Dept. of Corrections 3) [ ] Other - Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/~~Order Modifying/Revoking Probation/Community Supervision;~~ a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

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01-1-01150-4

[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 2.22.02

By direction of the Honorable

Karen L. Strombom

JUDGE

KAREN L. STROMBOM

BOB SAN SOUCIE

COUNTY CLERK

By: Dawn Ladenburg

DEPUTY CLERK

FILED
DEPT. 18
IN OPEN COURT
FEB 22 2002
Pierce County Clerk
By _____ DEPUTY

CERTIFIED COPY DELIVERED TO SHERIFF

Date 2 5 2002 By Dawn Ladenburg Deputy

STATE OF WASHINGTON,)
County of Pierce) ss:

I, Bob San Soucie, Interim Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court.
DATED: _____.

BOB SAN SOUCIE, Interim Clerk
By: _____ Deputy

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. JUSTIN MICHAEL HEGNEY, Defendant. DOB: 06/05/1985 SID NO.: WA20203762	CAUSE NO.01-1-01150-4 JUDGMENT AND SENTENCE (JS) [✓] Prison [ ] Jail One year or less [ ] First Time Offender [ ] Special Sexual Offender Sentencing Alternative [ ] Special Drug Offender Sentencing Alternative [ ] Breaking The Cycle (BTC)

I. HEARING

1.1 A sentencing hearing in this case was held on 2-22-02 and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 28th day of January, 2002 by

[ ] plea [X] jury-verdict [ ] bench trial of:

02-9-02262-7

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01-1-01150-4

Count No.: I
Crime: MURDER IN THE FIRST DEGREE, Charge Code: (D3)
RCW: 9A.32.030(1)(c) and 9A.08.020
Date of Crime: 08/19/2000
Incident No.: TPD 00-232-1277

as charged in the Original Information.

[ ] A special verdict/finding for use of a **firearm** was returned on Count(s)_____. RCW 9.94A.125, .310.

[ ] A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s)_____.RCW 9.94A.125, .310.

[ ] A special verdict/finding of **sexual motivation** was returned on Count(s)_____. RCW 9.94A.127.

[ ] A special verdict/finding for **violation of the Uniform Controlled Substances Act** was returned on Count(s)_____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, or within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local government authority as a drug-free zone.

[ ] A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s) _____. RCW 9.94A, RCW 69.50.401(a), RCW 69.50.440.

[ ] The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.

[ ] This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.129.

[ ] The crime charged in Count(s)_____involve(s) **domestic violence.**

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400):

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[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):
NONE KNOWN OR CLAIMED.

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360

[ ] the court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360):

[ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

Count	Offender Score	Serious Level	Standard Range (w/o enhancement)	Plus Enhancement*	Total Standard Range	Maximum Term
I	0	XV	240-320 MOS	NONE	240-320 MOS	LIFE/$50,000

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, (JP) Juvenile Present.

2.4 [ ] EXCEPTIONAL SENTENCE: Substantial and compelling reasons exist which justify an exceptional sentence [ ] above [ ] below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142):

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01-1-01150-4

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing ~~is agreements or plea agreements are~~ [ ] attached [✓] as follows:

State recommends sentence of 320 months.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 [ ]The Court DISMISSES Count(s)_____. [ ] The defendant is found NOT GUILTY of Count(s)_____.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma, WA 98402):

$ 120.11	Restitution to: Brian Toews	see attached order
$ 2,035.83	Restitution to: Crime Victims	
$_____	Restitution to: _____ (Name and Address-address may be withheld and provided confidentially to Clerk's Office).	
$ 500.00	Victim assessment	RCW 7.68.035
$ 110.00	Court costs, including	RCW 9.94A.030, 9.94A.120, 10.01.160, 10.46.190
	Criminal filing fee $_____	
	Witness costs $_____	
	Sheriff service fees $_____	
	Jury demand fee $_____	
	Other $_____	
$_____	Fees for court appointed attorney	RCW 9.94A.030
$_____	Court appointed defense expert and other defense costs	RCW 9.94A.030
$_____	Fine RCW 9A.20.021 [ ] VUCSA additional fine waived due to indigency	RCW 69.50.430

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01-1-01150-4

$_____ Drug enforcement fund of _____ RCW 9.94A.030

$_____ Crime Lab fee [ ] deferred due to indigency RCW 43.43.690

$_____ Extradition costs RCW 9.94A.120

$_____ Emergency response costs (Vehicular Assault, Vehicular Homicide only, $1000 maximum) RCW 38.52.430

$_____ Other costs for: _____

$ 7,765.94 TOTAL RCW 9.94A.145

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed order may be entered. RCW 9.94A.142. A restitution hearing:
[ ] shall be set by the prosecutor
[ ] is scheduled for _____

[X] RESTITUTION. See attached order.
[ ] Restitution ordered above shall be paid jointly and severally with:

NAME OF OTHER DEFENDANT	CAUSE NUMBER	VICTIM NAME	AMOUNT-$
See attached order			

[ ] The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010.
[X] All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than $_____ per month commencing _____. RCW 9.94A.145.
[ ] In addition to the other costs imposed herein, the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.145.
[ ] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

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[X] The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.2 [ ] HIV TESTING. The health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

[√] DNA TESTING. The defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.3 The defendant shall not have contact with _____ _____ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).
[ ] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.4 **OTHER:** _____

_____

4.4(a) Bond is hereby exonerated.

4.5 **CONFINEMENT OVER ONE YEAR:** The defendant is sentenced as follows:

(a) CONFINEMENT: RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

240 months on Count No. I _____ months on Count No. _____
_____ months on Count No. _____ _____ months on Count No. _____

Actual number of months of total confinement ordered is 240 months. (Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3 above).

(b) **CONSECUTIVE/CONCURRENT SENTENCES.** RCW 9.94A.400. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set

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forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

_____

The sentence herein shall run consecutively to all felony sentences in other cause numbers that were imposed prior to the commission of the crime(s) being sentenced.

The sentence herein shall run concurrently with felony sentences in other cause numbers that were imposed subsequent to the commission of the crime(s) being sentenced unless otherwise set forth here.[ ] The sentence herein shall run consecutively to the felony sentence in cause number(s) _____

_____

The sentence herein shall run consecutively to all previously imposed misdemeanor sentences unless otherwise set forth here: _____

_____

Confinement shall commence immediately unless otherwise set forth here: _____

_____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 544 days

_____

4.6 [X] **COMMUNITY PLACEMENT** (pre 7/1/00 offenses) is ordered as follows:
Count _____ for _____ months;
Count _____ for _____ months;
Count _____ for _____ months;

[X] **COMMUNITY CUSTODY** (post 6/30/00 offenses) is ordered as follows:
Count I for a range from 24 to 48 months;
Count _____ for a range from _____ to _____ months;
Count _____ for a range from _____ to _____ months;

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or for the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.120 for community placement/custody offenses--serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.
[ ] Defendant shall have no contact with: _____
[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to-wit: _____

_____

[ ] The defendant shall participate in the following crime-related treatment or counseling services: _____

_____

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: _____

_____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

_____

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4.7 [ ] **WORK ETHIC CAMP.** RCW 9.94A.137, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections:

_____

_____

V. NOTICES AND SIGNATURES

5.1. **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.145 and RCW 9.94A.120(13).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030.

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5.4. **RESTITUTION HEARING.**
[ ] Defendant waives any right to be present at any restitution hearing (defendant's initials): _____

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200.

5.6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

Cross off if not applicable:
5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the State of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of the Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of

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principles of fundamental fairness." Massey, 60 Wn.App. at 145, *citing*, Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L.Ed.2d 982 (1977).

As noted in Massey, the juvenile court's consideration of the penalties afforded in juvenile and adult adjudication leads to the decision to decline jurisdiction. Once juvenile jurisdiction is declined, "there is no cause to create a distinction between a juvenile and an adult who are sentenced to life without parole[.]" Massey, 60 Wn. App. at 145-46. The bottom line is that the Eighth Amendment is not violated if a juvenile offender tried as an adult receives an adult sentence. Boot, 130 Wn.2d at 570. See also State v. Stevenson, 55 Wn. App. 725, 737-38, 780 P.2d 873 (1989), review denied, 113 Wn.2d 1040, 785 P.2d 827 (1990); but see Thompson v. Oklahoma, supra at 838 (invalidating the death sentence of a juvenile who was 15 at the time of the violent homicide, concluding such a sentence does violate the Eighth Amendment's prohibition against cruel and unusual punishment).

Defendant attempts to use Thomspon v. Oklahoma, supra, as a springboard for the argument that trying a 15 year old in adult court is cruel. This is a huge logical and legal leap that cannot withhold scrutiny. Executing a juvenile for an act they committed while they were 15 years of age is far different from simply trying a 15 year old as an adult and sentencing him to a 20 year sentence. Also, because the Eighth Amendment protects against cruel and unusual *punishment* the defendant must make the argument to this court that the amount of time he received is unjust rather than the forum in which he was tried. As noted above, in Massey, the court rejected a 13-year-old's argument that

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the sentence of life imprisonment without the possibility of parole was cruel and unusual. Here the sentence (20 years) is not disproportionate to the crime (felony murder). In fact, defendant will be eligible for release when he is approximately 35 years of age, a sentence far removed from either a life term or death. Appendix A, RCW 9.94A.540 (1)(2).

7. THE EXPRESS LANGUAGE OF RCW 9.94A.540 PROVIDES THAT THERE IS NO RETROACTIVE APPLICATION OF THE 2005 AMENDMENT TO THE MANDATORY MINIMUM STATUTE AND THERE IS NO VIOLATION OF EQUAL PROTECTION.

Defendant asks this court for retroactive application of a sentencing law that was not in effect either at the time the crime was committed or at the time of sentencing. The plain language of the bill provides that there is no retroactive application.

In 2005 the legislature amended RCW 9.94A.540, the mandatory minimum sentence statute, and eliminated the mandatory minimum sentence for juveniles tried as adults.[6] RCW 9.94A.540 (1)(3), as amended by Laws of Washington 2005, ch. 437, §2. Included in this provision was the legislature's intent that "[t]his subsection (3) applies

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[6] § 9.94A.540. Mandatory minimum terms :
(1) Except to the extent provided in subsection (3) of this section, the following minimum terms of total confinement are mandatory and shall not be varied or modified under RCW 9.94A.535:
(a) An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years.

/ / / / /

(3) (a) Subsection (1) of this section shall not be applied in sentencing of juveniles tried as adults pursuant to RCW 13.04.030(1)(e)(i).
(b) This subsection (3) applies only to crimes committed on or after July 24, 2005.

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only to crimes committed on or after July 24, 2005." RCW 9.94A.540(3)(b). Thus the legislature's express intent is that this amendment is to apply prospectively only. The savings clause[7] also requires prospective application. "'[The] . . . savings clause is deemed a part of every repealing statute as if expressly inserted therein, and hence renders unnecessary the incorporation of an individual saving clause in each statute which amends or repeals an existing penal statute.'" State v. Ross, 152 Wn.2d 220, 237, 95 P.3d 1225 (2004), quoting, State v. Hanlen, 193 Wash. 494, 497, 76 P.2d 316 (1938). To avoid application of the savings clause the legislature must explicitly state its intent that the amendments its amending apply retroactivity to pending prosecutions. State v. Ross, 152 Wn.2d at 238. In this case the legislature made an express finding to the contrary. Also, the defendant cannot argue to this court to apply the version of the SRA that was drafted at the time of his sentencing because this version came over three years post-sentencing. There is no valid argument for retroactive application.

Nor is there any merit to defendant's equal protection claim.[8] As the Supreme Court also held in Ross, supra, a defendant's equal protection rights are not violated "'merely because the Legislature changed the standard sentencing range for a crime'" or

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[7] The savings clause provides that:

> Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040.

[8] The State incorporates by reference its equal protection law in section 1.

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"'changed its view of criminal punishment which resulted in offenders being subject to different punishment scheme.'" At 240-41, quoting, In re Pers. Restraint of Stanphill, 134 Wn.2d 165, 175, 949 P.2d 365 (1998). To hold otherwise would require a finding of a violation of equal protection in almost every instance when the legislatures changes its outlook on crime and punishment.

8. THE DEFENDANT IS NOT ENTITLED TO REVISIT HEARSAY ISSUES UNDER CRAWFORD.

Petitioner may not raise in a personal restraint petition an issue which "was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." In re Pers. Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). "Simply 'revising' a previously rejected legal argument . . . neither creates a 'new' claim nor constitutes good cause to reconsider the original claim." In re Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). "[I]dentical grounds may often be proved by different factual allegations. So also, identical grounds may be supported by different legal arguments, . . . or be couched in different language, . . . or vary in immaterial respects." Thus, for example, "a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on physical coercion." Jeffries, 114 Wn.2d at 488 (citations omitted). A petitioner may not create a different ground for relief merely by alleging different facts, asserting different legal theories, or couching his argument in different language. Lord, 123 Wn.2d at 329. Petitioner's hearsay argument was already rejected in his direct appeal. Appendix I. Petitioner presents no argument as to why the interests of justice require relitigation of this previously decided claim. This claim should be summarily dismissed.

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Defendant attempts to overcome this procedural bar by arguing that the issuance of the opinion of Crawford v. Washington,[9] calls for reexamination of this issue. Defendant overlooks our Supreme Court's decision in In re Markel,[10] which ruled that Crawford did "not announce a `watershed rule of criminal procedure' `without which the likelihood of an accurate conviction is seriously diminished,'" and thus defendants filing personal restraint petitions are not entitled to retroactive application of this rule. 154 Wn.2d at 254 (quoting, Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519, 2523, 159 L.Ed.2d 442 (2004) (quoting, Teague v. Lane, 489 U.S. 288, 311, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989)).

Even if defendant were entitled to retroactive application, there were no "testimonial" statements offered against petitioner; the severance motion protected any confrontation clause concerns.

Pursuant to CrR 4.4(c)(1) a motion for severance will be granted unless the co-defendant's statement is redacted to delete all references of the moving defendant. This court rule "was adopted to avoid the constitutional problem encountered in United States v. Bruton, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968)." The court reviews de novo alleged violations of Bruton. State v. Larry, 108 Wn. App. 894, 901, 34 P.3d 241 (2001).

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[9] 541 U.S. 36, 124 S. Ct. 1354, 1374, 158 L.Ed.2d 177 (2004) (The Confrontation Clause generally precludes admission of a testimonial hearsay statement unless the defendant has had a prior opportunity to cross-examine the declarant).

[10] 154 Wn.2d 262, 111 P.3d 249 (2005).

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In Bruton, the Court held that a defendant is deprived of his rights under the Confrontation Clause when his nontestifying co-defendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the defendant. Bruton, 391 U.S. at 136. The Court reasoned that the co-defendant essentially becomes one of the defendant's accusers, and the defendant's right to confrontation is violated when he is not able to cross-examine the codefendant at trial. Bruton, 391 U.S. at 134.

Nineteen years after the issuance of Bruton, the U.S. Supreme Court clarified and narrowed the scope of the Bruton rule in Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). See State v. Cotton, 75 Wn. App. 669, 690-91, 879 P.2d 971, review denied, 126 Wn.2d 1004 (1). In Richardson, the Court held admissible a codefendant's confession that was redacted to omit all reference to the defendant where the trial court gave an appropriate limiting instruction. Richardson, 481 U.S. at 208. The Court reasoned that this redacted confession fell outside Bruton's prohibition because the statement was not "incriminating on its face" and became incriminating "only when linked with evidence introduced later at trial." Richardson 481 U.S. at 208. The Court in Richardson compared its earlier holding in Bruton and noted that: "[o]n the precise facts of Bruton, involving a facially incriminating confession, we found [a limiting instruction] . . . inadequate. . . . The calculus changes when confessions that do not name the defendant are at issue." Richardson, 481 U.S. at 211.

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The lower court had reversed the defendant's conviction based on its interpretation that Bruton required the trial court to access the confession's inculpatory value by examining not only the face of the confession, but also *all of the evidence introduced at trial.* Richardson v. Marsh, 781 F.2d 1201, 1212 (6th Cir. 1986). The Court reversed the lower court because the redacted confession at issue was not facially incriminating in that it did not refer to the defendant by name, and therefore admission of the statement complied with the Confrontation Clause. Richardson, 481 U.S. at 209. The Court in Richardson also stated as follows: "We express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." Richardson, 481 U.S. at 211, fn. 5.

Eleven years after Richardson, the Court addressed this very issue involving symbols or neutral pronouns in Gray v. Maryland, 523 U.S. 185, 188 S.Ct. 1151, 140 L.Ed.2d 294 (1998). In Gray, the victim was beaten to death by a group of six assailants. One of the defendants gave a confession implicating himself and two other codefendants. In a joint trial, the prosecution redacted the nontestifying codefendant's confession by replacing the other defendants' names with a blank space or the word "deleted". Gray-, 523 U.S. at 188. The Court rejected this approach and held that redactions that simply replace a name with an obvious blank space or word such as "deleted" violate Bruton. Gray, 523 U.S. at 192.

When read together, Bruton, Richardson and Gray allow the admission of redacted statements when the statements are: (1) facially neutral, i.e., do not identify by

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name the codefendant joined for trial (Bruton and Richardson); (2) free of obvious deletions such as a "blank" or "X" denoting the name of a codefendant (Gray); and (3) accompanied by a limiting instruction (Richardson). Larry, 108 Wn. App. at 905.

In this case, Hill's statement was redacted to omit all reference to Hegney. Hegney's name was simply deleted and not substituted with either a symbol or a neutral pronoun. Hegney's statement was also redacted to remove all reference to Hill, and his name was not substituted with either a symbol or a pronoun. The trial court also gave a limiting instruction requiring the jurors not to consider a defendant's statement against the co-defendant. (Appendix F, Inst. #35). The trial court complied with Bruton/Crawford when it denied defendant's motion for severance.

Defendant nonetheless argues that Hill's redacted statement prejudiced him even though Hegney's name appears nowhere in Hill's statement. He argues that Hill made various references to "everybody" doing various things during the incident[11] and by "*implication*" Hegney was thereby incriminated. The court should reject defendant's arguments. As outlined above, Hill's redacted statement complied with the requirements of Bruton. The court also instructed the jury to not consider a defendant's statements

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[11] In Hill's redacted statement, Hill initially stated that he was not involved in the assaultive incidents near Wright Park, but knew the following were involved: "Terry, Robert, Manuel and Jamar." RP 2217. He later stated that he met up with the group prior to Toews' murder, but still maintained he did not participate in the beating, and he specifically named the group members as "Terry Hunt, Robert and Manuel Hernandez, Andrew Neely, Jamar [Spencer] and Elisha [Thompson]." RP 2219. He then admitted he had not been truthful, and stated that on the night of the murder, he and Beaver had met up with the group, and this group consisted of: "Terry, Robert, Jamar, Andrew, and Elisha. . . [and] Manuel." RP 2220-21. He then recounted what people did individually to Toews. RP 2221-24. Regarding these individuals, Hill stated that "everyone else had equally participated in the assault" except himself. RP 2223.

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against the co-defendant. (Appendix F). A jury is presumed to have followed the court's instructions. State v. Foster, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). Defendant has no factual basis for asserting that the jury disregarded the court's instruction.

9. PETITIONER MAY NOT RELITIGATE HIS DIRECT APPEAL.

Petitioner may not raise in a personal restraint petition an issue which "was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." In re Pers. Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). "Simply 'revising' a previously rejected legal argument . . . neither creates a 'new' claim nor constitutes good cause to reconsider the original claim". In re Jeffries, 114 Wn.2d at 488.

Petitioner makes a blanket claim that this court should reconsider his previous appellate issues without any argument that it is required in the interest of justice and without any analysis. The State asks this court to reject a revisitation of these issues.

10. THE STATE ASKS THIS COURT TO LOOK TO DEPARTMENT OF CORRECTIONS LEGAL BRIEFING FOR THE GOOD TIME ARGUMENT.

The State adopts the argument and legal authority contained in the Department of Corrections Brief filed in this matter on January 12, 2006.

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D. CONCLUSION:

For the foregoing reasons the State respectfully requests that this court dismiss the petition.

DATED: March 13, 2006.

GERALD A. HORNE
Pierce County Prosecuting Attorney

MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/13/06 Johnson

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06 MAR 13 PM 3:52
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BY
DEPUTY

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APPENDIX "A"

Judgment and Sentence